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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-214

CALNETICS CORPORATION and MEIER-LINF, INC.,

Petitioners,

vs.

VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGEN PRODUCTS CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

A. Basic Facts 4

B. Proceedings in the District Court 6

C. Proceedings in the Court of Appeals 8

Reasons for Granting Writ 11

I.

The Availability of Divestiture Under Section 16 of the Clayton Act Is a Question of Recognized Public Importance and Basic Policy, Resolution of Which Affects Not Only the Disposition of This Case but the Administration of the Antitrust Laws Generally 11

II.

The Ninth Circuit's Ruling on Divestiture Is a New and Erroneous Construction of a Federal Statute, 15 U.S.C. § 26, in an Area of Exclusive Federal Jurisdiction 18

III.

There Is a Split of Judicial Opinion on the Availability of Divestiture Which Requires Resolution by This Court 21

IV. Page

The Availability of Attorneys' Fees Is Also a Question of Basic Antitrust Enforcement Policy Which Requires Resolution by This Court 24

Conclusion 28

INDEX TO APPENDICES

Appendix A. Memorandum Opinion and Order ..... App. p. 1

Appendix B. Supplemental Memorandum Opinion and Order 35

Appendix C. Opinion of the United States Court of Appeals for the Ninth Circuit 49

Appendix D. Order 93

TABLE OF AUTHORITIES CITED

Cases Page

Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888 (S.D.N.Y.), modified, 80 F. Supp. 890 (S.D. N.Y. 1948) 11

Alphin v. Henson, 5 Trade Reg. Rep. ¶ 60,880 (4th Cir. 1976) 27

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 3, 25, 26, 27

American Commercial Barge Line Co. v. Eastern Gas and Fuel Associates, 204 F. Supp. 451 (S.D. Ohio 1962) 12

American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958) 11, 21

Bay Guardian Co. v. Chronicle Publ. Co., 340 F. Supp. 76 (N.D. Cal. 1972) 11

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 19

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., cert. granted, ... U.S. ...., 96 S. Ct. 1101 (1976) 6

Citizen Publ. Co. v. United States, 394 U.S. 131 (1969) 19

Continental Securities Co. v. Michigan Cent. R. Co., 16 F.2d 378 (6th Cir. 1926), cert. denied, 274 U.S. 741 (1926) 11, 12

Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971), aff'd, 476 F.2d 989 (5th Cir. 1973), rehearing denied, 478 F.2d 1402 (5th Cir. 1973) 11

Fein v. Security Banknote Co., 157 F. Supp. 146 (S.D.N.Y. 1957) 12

Page

Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 8

Ford Motor Co. v. United States, 405 U.S. 562 (1972) 14

Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636 (S.D.N.Y. 1975) 13, 22, 23

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) 11

Graves v. Cambria Steel Co., 298 Fed. 761 (S.D. N.Y. 1924) 11

Hall v. Cole, 412 U.S. 1 (1973) 10

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 25

International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 518 F.2d 913 (9th Cir. 1975), rev'g 351 F. Supp. 1153 (D. Hawaii 1972) .....
.....9, 10, 11, 12, 15, 16, 18, 19, 23, 25

J. D. Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120 (N.D. Cal. 1970) 11

Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D.N.Y. 1965) 11

Lennon, In re, 166 U.S. 548 (1897) 18

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 10

NBO Industries Treadway Cos. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), cert. granted on other questions sub nom., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., ... U.S. ...., 96 S. Ct. 1101 (1976) 12, 13, 21, 22

National Supply Co. v. Hillman, 57 F. Supp. 4 (W.D. Pa. 1944) 11

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) .. 27

Page

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 13

Schine Chain Theatres v. United States, 334 U.S. 110 (1948) 17

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 8

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 19, 20

United States v. Aluminum Co. of America, 377 U.S. 271 (1964) 19

United States v. American Tobacco Co., 221 U.S. 106 (1911) 17, 20

United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961) 14, 15, 17, 19

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 19

United States v. Von's Grocery Co., 384 U.S. 270 (1966) 19

Utah Public Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969) 14

Venner v. Pennsylvania Steel Co. of New Jersey, 250 Fed. 292 (D.N.J. 1918) 11

Westor Theatres, Inc. v. Warner Bros. Pictures, Inc., 41 F. Supp. 757 (D.N.J. 1941) 12

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 13, 25

Miscellaneous

51 Congressional Record (1914), p. 14,215 20

Hearings on Trust Legislation Before the House Committee on the Judiciary, 63d Cong., 2d Sess. (1914), p. 843 20

Page

House Report No. 627, 63d Cong., 2d Sess. (1914) 20

Senate Report No. 698, 63d Cong., 2d Sess. (1914) 20

Statutes

Clayton Act, Sec. 3 (15 U.S.C. § 14) 5

Clayton Act, Sec. 4 (15 U.S.C. § 15) 5, 10, 25, 27, 28

Clayton Act, Sec. 7 (15 U.S.C. § 18) 2, 3, 4, 5, 6, 8, 19

Clayton Act, Sec. 11(b) 20

Clayton Act, Sec. 15 (15 U.S.C. § 25) 15, 19

Clayton Act, Sec. 16 (15 U.S..C § 26) ....1, 3, 5, 6 .....9, 10, 11, 12, 13, 18, 19, 20, 21, 22, 25, 27, 28

Sherman Act, Sec. 1 (15 U.S.C. § 1) 5

Sherman Act, Sec. 2 (15 U.S.C. § 2) 5

Sherman Act, Sec. 4 (15 U.S.C. § 4) 14, 20

38 Statutes at Large, pp. 731, 737 .....3, 4

64 Statutes at Large, p. 1125 4

United States Code, Title 28, Sec. 1254(1) 2

Textbooks

"National Institute on Corporate Trust Busters", Section of Antitrust Law, American Bar Ass'n, San Francisco, November 8-9, 1973 (Antitrust Law Journal, Vol. 43, No. 1) 12

Note, Antitrust-Divestiture Is Available to a Private Plaintiff Under Section 16 of the Clayton Act, 49 Tex. L. Review (1971), pp. 542, 549 .....12, 14

Page

Note, Antitrust Law—Divestiture Is Not an Available Remedy in Private Actions Under Section 16 of the Clayton Act, 25 Cath. L. Rev. (1975), p. 167 12

Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn. L. Rev. (1964), pp. 267, 272-73 .....12, 14

Note, Private Divestiture: Antitrust's Latest Problem Child, 41 Fordham Law Review (1973), pp. 569, 581, 591 .....11, 12, 18

Note, The Use of Divestiture in Private Antitrust Suits, 43 Geo. Wash. L. Rev. (1974), p. 261 12

Peacock, Private Divestiture Suits Under Section 16 of the Clayton Act, 48 Tex. L. Rev. (1969), pp. 54, 55 .....12, 17

"Private Enforcement of the Anti-Merger Laws", Committee on Trade Regulation of the Ass'n of the Bar, City of New York, Jan. 14, 1976 12

"Private Enforcement of Section 7 of the Clayton Act", Section of Antitrust Law, American Bar Ass'n 12

IN THE

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Petitioners,

vs.

VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGEN PRODUCTS CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Calnetics Corporation and Meier-Line, Inc., plaintiffs below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 24, 1976, reversing portions of the judgment of the United States District Court for the Central District of California which had determined that plaintiffs were entitled to the equitable relief of divestiture under Section 16 of the Clayton Act, 15 U.S.C. § 26, and which, under the same section, had awarded plaintiffs a reasonable attorneys' fee in this action.

Opinions Below.

The Memorandum Opinion and Order of the district court, dated June 30, 1972, determining that the acquisition of Delanair Engineering Company (later renamed

and sued as defendant Volkswagen Products Corporation) violated Section 7 of the Clayton Act and recognizing divestiture as a proper form of relief is reported at 348 F. Supp. 606 (C.D. Cal. 1972) (Appendix A).[1] The Supplemental Memorandum Opinion and Order of the district court, requiring divestiture and the payment of attorneys' fees was entered January 19, 1973 and is reported at 353 F. Supp. 1219 (C.D. Cal. 1973) (Appendix B).

The Opinion of the Ninth Circuit, dated February 24, 1976, reversing the district court's rulings on divestiture and attorneys' fees and affirming in part, reversing in part other rulings in the case, is reported at 532 F.2d 674 (9th Cir. 1976) (Appendix C).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered February 24, 1976. Respondents Volkswagen of America, Inc., and Volkswagen Products Corporation were granted an enlargement of time in which to file a petition for rehearing and thereafter filed such a petition within the time permitted. The Order denying their petition was entered May 17, 1976 (Appendix D). This petition is being filed within 90 days of the aforesaid date of May 17, 1976.

Questions Presented.

1. Whether divestiture of an illegally acquired company is available as a remedy for a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in a private

[1]On August 1, 1972, the district court entered Findings of Fact and Conclusions of Law disposing of other claims in this case not involved in this petition. These are reported at 348 F. Supp. 623 (C.D. Cal. 1972).

suit for equitable relief under Section 16 of the Clayton Act, 15 U.S.C. § 26.

2. Whether a private plaintiff suing under Section 16 of the Clayton Act may be awarded a reasonable attorneys' fee and whether the court below improperly applied the holding of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), to preclude absolutely attorneys' fee awards in suits under that section.

Statutes Involved.

The interpretation of Section 16 of the Clayton Act, 15 U.S.C. § 26, is directly at issue in this petition. Section 16 provides in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of a proper bond against damages for a writ improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ." Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

The violation involved was a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, which provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any

part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ." Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.

Statement of the Case.

A. Basic Facts.

Petitioner Calnetics Corporation ("Calnetics") is a small California company which has been engaged in the business of manufacturing and selling automotive air conditioners exclusively designed for use in Volkswagen, Karmann Ghia and Porsche automobiles. This business has been conducted through petitioner Meier-Line, Inc., a wholly-owned subsidiary, previously a division, of Calnetics.

Respondent Volkswagen Products Corporation ("VPC") has also been engaged, in competition with Calnetics, in the manufacture and sale of automotive air conditioners designed exclusively for use in Volkswagen, Karmann Ghia and Porsche automobiles. Until September 26, 1969, this company was independently owned and operated under the name Delanair Engineering Company ("Delanair").

Respondent Volkswagen of America, Inc. ("VWoA"), is a wholly-owned subsidiary of the German manufacturer of Volkswagen automobiles. At all times relevant hereto, VWoA has been the exclusive importer of Volkswagen, Karmann Ghia and Porsche

automobiles into the United States and the major customer in the market for air conditioners designed exclusively for such cars. On September 26, 1969, VWoA acquired all of the outstanding shares of Delanair and began to operate it as a subsidiary under the name Volkswagen Products Corporation.

Volkswagen Pacific, Inc. ("VPI"), named as defendant below, is the Volkswagen, Karmann Ghia and Porsche distributor in the southwestern states and an erstwhile customer of Calnetics.

Almost immediately after the acquisition, Delanair began to reap the benefits of its new deep pocket parent; VWoA infused it with a $575,000 interest free loan, a guarantee of its line of credit, an entire new management team, a strong technical field force and, of course, a new "Volkswagen" name.

Believing that the acquisition of Delanair by VWoA would severely restrict effective competition with it, and believing further that VWoA, VPC and VPI were engaging in specific programs designed to eliminate "outside" sources of air conditioners through threats regarding car allocations and loss of warranties to Volkswagen dealers, disparagement of Meier-Line and other means, Calnetics filed this private antitrust action against VWoA, VPC and VPI on September 28, 1970, seeking damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Meier-Line, Inc., was joined as a named plaintiff after it became a separate corporation.

The plaintiffs asserted violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Sections 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14, 18, and the defendants raised various counterclaims. Only one of these numerous claims is the subject of this

petition; that is plaintiffs' claim under Section 16 of the Clayton Act for equitable relief from VWoA's acquisition of Delanair in violation of Section 7 of that Act.

B. Proceedings in the District Court.

Plaintiffs' Section 7 claims were tried separately from the other issues in the action. At the close of plaintiffs' case-in-chief, on their Section 7 claims, the district court directed a verdict against them on the claim for damages on the ground that the damages sustained by plaintiffs were not causally connected to an actual substantial lessening of competition following VWoA's acquisition of Delanair.[2] The jury that had been impaneled to decide the damage claims was dismissed, and the trial continued before the court on the equitable portions of plaintiffs' claims.

On June 30, 1972, the district court filed its Memorandum Opinion and Order ruling that VWoA's acquisition of Delanair, now VPC, tended to restrain competition in the market for Volkswagen, Karmann Ghia and Porsche air conditioners in violation of Section 7 of the Clayton Act. The court reviewed the "dramatics of the acquisition," including VWoA's position at the time of acquisition as the largest purchaser of such air conditioners; Delanair's position at that time as the largest manufacturer of these products, but one

[2]The question whether or not such an actual substantial lessening of competition is prerequisite to the accrual of a claim for damages under Section 7 is presently pending before this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., cert. granted,* .... U.S. ...., 96 S. Ct. 1101 (1976).

whose market share was slipping; the infusion of VWoA wealth, talent and name attractions; the quickly consequent reestablishment of a market dominance of 71% by VPC in 1971; the attendant significant adverse impact on two of VPC's four competitors; and the virtual elimination of two more. 348 F. Supp. at 613-14, 620-21. "A dispassionate review of these facts," said the court, "leads to the inevitable conclusion that this acquisition is monopoly in its incipiency. As such, the acquisition is in violation of Section 7 of the Clayton Act." *Id.* at 621.

The court therefore granted judgment for Calnetics on its equitable claim and ordered the parties to file plans on divestiture and other equitable relief. *Id.* at 623.

On January 22, 1973, following an evidentiary hearing on relief, the district court entered its Supplemental Memorandum Opinion and Order requiring VWoA to divest itself of all its interest in VPC and granting ancillary injunctive relief. 353 F. Supp. at 1219. The court stressed that divestiture was the only means of denying VPC "the aid of the protective practices of a parent who is its sole customer" and thus of restoring the competition affected by the acquisition. *Id.* at 1221.

The court also granted plaintiffs' request for a reasonable attorneys' fee, stating that "[t]he authority for the relief granted plaintiff herein is found in Section 16 of the Clayton Act" which provides for private injunctive relief through "the application of general equitable principles." *Id.* at 1224. The court noted

that the general view that attorneys' fees are not recoverable in an equity action is subject to exceptions when "overriding considerations of justice" compel a contrary result. *Id.* quoting *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). The court found that plaintiffs had vindicated a policy of compelling national interest and conferred a benefit on the marketplace thus bringing their request for attorneys' fees within the principles of *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939) (which states that the allowance of counsel fees "is part of the historic equity jurisdiction of the federal courts"), and within the "overriding considerations of justice" principle stated in *Fleishmann*. *Id.* at 1225.

C. Proceedings in the Court of Appeals.

On appeal to the Ninth Circuit, the Section 7 claims were consolidated with the other claims and counterclaims in this action. The United States, through the Antitrust Division of the Department of Justice, filed a brief as *amicus curiae* on selected issues. The first point of the brief was that "Divestiture Is An Available Remedy in Private Actions Under Section 16 of the Clayton Act."

On February 24, 1976, the court of appeals affirmed in part and reversed in part the various rulings of the district court and remanded certain of the claims for trial. Both the divestiture order and the grant of attorneys' fees were reversed, while the ancillary relief was heavily criticized. 532 F.2d at 679, 692-95.

Calnetics and Meier-Line were the first private plaintiffs ever to obtain a divestiture decree. However, while the appeal from this decree was pending, the Ninth Circuit heard and reversed a later case in which divestiture had been decreed by the Hawaii district court. *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975) ("*ITT v. GTE*"), *rev'g* 351 F. Supp. 1153 (D. Hawaii 1972). In *ITT v. GTE*, the Ninth Circuit reviewed the case law on private divestiture, found it "unpersuasive" and turned to the legislative history of Section 16 to determine whether "divestiture" was "injunctive relief" within the grant of that section. *Id.* at 920-21. Based upon statements made during hearings on the bill by individual members of the House Judiciary Committee to the effect that they did not believe the section would authorize private suits for "dissolution" and upon remarks suggesting that dissolution denotes divestiture, the court decided that Congress, in granting private antitrust enforcers the right to "injunctive relief," did not grant them the right to seek, or the courts the discretion to allow, divestiture. *Id.* at 921-25.

Thus, when it decided this action, the court simply held summarily that "[u]nder the law of this circuit, the remedy of divestiture is not available to private plaintiffs in the antitrust suits," and cited *ITT v. GTE*. 532 F.2d at 692.

As to attorneys' fees, the Ninth Circuit was equally brief. In *ITT v. GTE*, the court had upheld such

an award and rejected the claim that the explicit provision for attorneys' fees in the treble damage provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15, should *ipso facto* be read to deny courts the power to award them in suits under Section 16. 518 F.2d 938-40. It had cited *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Hall v. Cole*, 412 U.S. 1 (1973), for the proposition that express provisions for fees in one section of a statute should not be read to deny courts the power to award them under other sections "when such an award would otherwise be appropriate." *Id.* at 939. The court had cautioned that such awards should be reserved for "the exceptionally rare case" but observed that GTE did not deny that the grant of fees fell within the exception for suits by a "private attorney general" previously recognized by the circuit. *Id.* at 940.

In the present case, the Ninth Circuit reversed its position, stating:

> "The district court awarded Calnetics attorneys' fees because it had acted 'in the role of "private attorney general * * *."' 353 F. Supp. at 1225. Such an award is now precluded by *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)." 532 F.2d at 694-95.

REASONS FOR GRANTING WRIT.

I.

The Availability of Divestiture Under Section 16 of the Clayton Act Is a Question of Recognized Public Importance and Basic Policy, Resolution of Which Affects Not Only the Disposition of This Case but the Administration of the Antitrust Laws Generally.

Prior to the decisions in this case and *ITT v. GTE*, no court had ever explicitly granted divestiture relief to a private plaintiff, and no court had definitively ruled it unavailable. *See* Note, *Private Divestiture: Antitrust's Latest Problem Child*, 41 Fordham L. Rev. 569, 591 (1973). Some courts, however, had in effect granted divestiture by imposing restraints which rendered illegally held property worthless in the hands of the wrongdoer;[3] and the growing weight of views on the subject indicated that divestiture is and should be available under Section 16.[4] In this very case,

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[3] *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 400-01 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888 (S.D.N.Y.), *modified*, 80 F. Supp. 890 (S.D.N.Y. 1948).

[4] *Compare, e.g., Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 460-62 (1945) (upholding in principle the right to dissolution of an illegal rate-fixing association); *National Supply Co. v. Hillman*, 57 F. Supp. 4 (W.D. Pa. 1944); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *J. D. Burkhead v. Phillips Petroleum Co.*, 308 F. Supp. 120, 126-27 (N.D. Cal. 1970); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973), *rehearing denied*, 478 F.2d 1402 (5th Cir. 1973); *Bay Guardian Co. v. Chronicle Publ. Co.*, 340 F. Supp. 76 (N.D. Cal. 1972), and cases cited note 3 *supra*; *Venner v. Pennsylvania Steel Co. of New Jersey*, 250 Fed. 292, 296 (D.N.J. 1918); *Graves v. Cambria Steel Co.*, 298 Fed. 761, 762 (S.D.N.Y. 1924); *Continental Securities Co. v. Michigan Cent. R. Co.*, 16 F.2d 378, 379

(This footnote is continued on next page)

the Justice Department added its voice in favor of private divestiture and affirmatively supported the availability of such relief in its *amicus* brief to the Ninth Circuit.

As a climax of the trend toward divestiture in private suits, this case and *ITT v. GTE* have become a focal point of law review articles and bar symposia across the country.[5] As an abrupt retrenchment, the Ninth Circuit rule has received not only academic but judicial criticism and has, in effect, precipitated a split of opinion among the circuits. *See NBO Industries Tread-*

(6th Cir. 1926), *cert. denied,* 274 U.S. 741 (1926); *Westor Theatres, Inc. v. Warner Bros. Pictures, Inc.,* 41 F. Supp. 757, 763 n. 7 (D.N.J. 1941); *Fein v. Security Banknote Co.,* 157 F. Supp. 146 (S.D.N.Y. 1957); *American Commercial Barge Line Co. v. Eastern Gas and Fuel Associates,* 204 F. Supp. 451, 453 (S.D. Ohio 1962); *see also* Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act,* 48 Tex. L. Rev. 54 (1969); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act,* 49 Minn. L. Rev. 267 (1964); Note, *Antitrust-Divestiture Is Available to a Private Plaintiff Under Section 16 of the Clayton Act,* 49 Tex. L. Rev. 542 (1971).

[5]*See* Comment, *Private Divestiture: Antitrust's Latest Problem Child,* 41 Fordham L. Rev. 569 (1973); Note, *The Use of Divestiture in Private Antitrust Suits,* 43 Geo. Wash. L. Rev. 261 (1974); Note, *Antitrust Law—Divestiture Is Not an Available Remedy in Private Actions Under Section 16 of the Clayton Act,* 25 Cath. L. Rev. 167 (1975), all urging recognition of a private remedy of divestiture under Section 16. This case and *ITT v. GTE* were also the subject of extensive discussion at the "National Institute on Corporate Trust Busters" held by the Section of Antitrust Law, American Bar Ass'n, in San Francisco, on November 8-9, 1973 (reported in the Section's *Antitrust Law Journal,* Vol. 43, No. 1), at a roundtable discussion held at the American Bar Ass'n's Annual Meeting in Montreal, Canada, in August 1975 and at a symposium on "Private Enforcement of the Anti-Merger Laws" held by the Committee on Trade Regulation of the Ass'n of the Bar of the City of New York on January 14, 1976. The availability of private divestiture will be further discussed in a monograph on "Private Enforcement of Section 7 of the Clayton Act" currently being prepared by the Section of Antitrust Law, American Bar Ass'n.

way Cos. v. Brunswick Corp., 523 F.2d 262, 278-79 (3d Cir. 1975), *cert. granted* on other questions *sub nom., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* .... U.S. ...., 96 S. Ct. 1101 (1976); *see also Fuchs Sugars & Syrups, Inc. v. Amstar Corp.,* 402 F. Supp. 636, 638-40 (S.D.N.Y. 1975), and discussion at point III, *infra.*

The widespread concern over the availability of private divestiture and the criticism which the Ninth Circuit's refusal to permit it has received reflect the very basic policies involved here. Stated in terms of public policy, the question presented here is where the private litigant, who, under the law, is to serve as a "bulwark of antitrust enforcement" can or cannot obtain "the most effective of antitrust remedies."

The major role of the private antitrust plaintiff as a "bulwark of antitrust enforcement" is well established. *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 139 (1968). This Court has recognized that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws . . . [and] . . . the law encourages [the private] suit to further the overriding public policy in favor of competition." *Id.* Therefore, this Court has directed that Section 16, by which private suitors may avert or abate competitive injury, be construed and applied with "the high purpose of enforcing the antitrust laws . . . in mind." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969).

Such directions not only embody considered and deliberate policy, they reflect practical realities. The government, which may institute equity proceedings

under Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25, lacks the resources to proceed against more than a handful of antitrust offenders at a given time; by far the greater percentage of antitrust suits are commenced by private parties.[6]

The stature of divestiture as the best remedy for serving the high purpose of enforcing the national interest in competitive market structures is equally well established. As stated in *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329-31 (1961) ("*du Pont*"), and reaffirmed in *Utah Public Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 471 (1969), and *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972):

> "*The very words of § 7 suggest that an undoing of the acquisition is a natural remedy.* Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. *Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when*

[6]Note, *Availability of Divestiture in Private Litigation, supra*, 49 Minn. L. Rev. at 272-73 n. 35; Note, *Divestiture Is Available, supra*, 49 Tex. L. Rev. at 549.

> *a violation of § 7 has been found.*" 366 U.S. at 329-31 (emphasis added).

The direct effect of the Ninth Circuit rule against divestiture is then, quite simply, to remove this most important antitrust remedy from the reach of those persons on whom an indispensable amount of antitrust enforcement depends. It forces them, and the interests of the public whom they serve, to rely on the cumbersome and time-consuming process of enforcing a negative injunction sporadically through contempt proceedings. Worse yet, for many illegal acquisition cases, it removes the only realistic remedy because, as this Court has noted, a negative injunction "can hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself." *du Pont, supra*, 366 U.S. at 334.

Even the Ninth Circuit, while contradicting this perception and asserting the efficacy of lesser remedies, virtually admitted the untoward effect of its rule:

> "*We acknowledge that by withdrawing the remedy of divestiture we withhold from private parties the simplest, easiest, and surest form of relief for antitrust violations* 'whose heart is intercorporate combination and control * * *.' *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329, 81 S. Ct. 1243, 1251, 6 L. Ed. 2d 318 (1961). But we are confident that the pernicious manifestations or tendencies of an illegal vertical combination—such as an anticompetitive purchasing policy—are susceptible to direct injunctive restraint. Relief—such as an 'open purchasing' requirement—directed at the symptom rather

> than the underlying cause may indeed prove somewhat burdensome to the enjoined party; as GTE plausibly argues in its brief, it may 'hamper * * * daily business and subject [the enjoined party] to the threat of contempt whenever [the prevailing party] fails to make a proposed equipment sale.' If this threat is sufficiently serious, then a possible recourse for GTE is to stipulate to the remedy of divestiture as an alternative." 518 F.2d at 925 (emphasis added).

Thus, in the same breath in which it uttered professions of confidence in direct injunctive restraint, the Ninth Circuit belied them; in the same breath in which it ruled that divestiture could not be ordered, it virtually acknowledged that it might be the only workable remedy.

Yet, at the same time, the Ninth Circuit has greatly enhanced the untoward effect of its rule by severely limiting the range of available direct restraints. In *ITT v. GTE*, it forbad the use of any decree which "in effect" directs divestiture, such as a permanent injunction against voting acquired stock or obtaining representation on an acquired company's board of directors (518 F.2d at 924), and in this case, it, in effect, denounced the use of other direct relief by critically questioning all the ancillary relief granted below. 532 F.2d at 692-94.

Moreover, since a private litigant can enjoin an unlawful acquisition before it is consummated, the Ninth Circuit rule creates a curious anomaly. "[T]he acquiring corporation 'can retain what it illegally obtained

so long as it has been more nimble than its victim." Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 Tex. L. Rev. 54, 55 (1969). The description of divestiture in *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948), as "an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project," clearly suggests that the antitrust laws are not intended to extend preferential treatment to those violators who act quickly and quietly. On the other hand, courts should not be forced, as they well might be under the Ninth Circuit rule, to enjoin socially desirable acquisitions simply out of an excess of caution.

In short, the Ninth Circuit rule encourages precipitate action in some cases while discouraging considered enforcement in many more. It eviscerates the force of private injunctive actions as a tool for promoting the public interest in continuously open, competitive markets. Above all, for those cases in which, as in this one, the continued existence of the illegal combination is itself the evil sought to be remedied, the Ninth Circuit rule is tantamount to an abrogation of the deeply rooted principle that courts of equity "decree relief effective to redress the violations." *du Pont, supra*, 366 U.S. at 326; *see also United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911). As such, it presents so basic a qualification on so much established antitrust and equity policy that it merits the attention of this Court.

II.

The Ninth Circuit's Ruling on Divestiture Is a New and Erroneous Construction of a Federal Statute, 15 U.S.C. § 26, in an Area of Exclusive Federal Jurisdiction.

The Ninth Circuit rule against private divestiture is not based on policy considerations, for, as the Ninth Circuit itself virtually conceded, such concerns tend to support a contrary rule. It is not based on judicial precedents, for the court found these "unpersuasive." 518 F.2d at 920-21. Nor is it based on the express language of Section 16.

The critical words of Section 16 state simply that persons threatened with injury from antitrust violations "shall be entitled to sue for and have injunctive relief." 15 U.S.C. § 26. Clearly, this language makes no distinctions between various forms of injunctive relief, and it contains no exclusions. As the Justice Department aptly pointed out in its *amicus* brief in this case, a divestiture decree is a species of mandatory injunction requiring a defendant to sell off property illegally acquired or illegally held, and mandatory injunctions (*i.e.*, those which require the performance of acts) were well known and employed at the time the Clayton Act was passed. Brief for the United States as Amicus Curiae, at 10, citing *In re Lennon*, 166 U.S. 548, 556 (1897); *see also Private Divestiture Antitrust's Latest Problem Child*, 41 Fordham L. Rev. 569, 581 (1973). Given, then, the traditionally wide latitude of equity courts to fashion appropriate remedies, given their basic duty to fashion sufficient remedies and given the absence of any explicit circumscription of their power to do so or any specific exclusion of divestiture or other mandatory injunctive relief from

Section 16, the simple, broad language of the statute supports the conclusion that divestiture is one possible remedy under it.

This conclusion is buttressed by the fact that the language of Section 16 is at least as broad as the language of Section 15 of the Clayton Act, 15 U.S.C. § 25, under which the government may "institute proceedings in equity to prevent and restrain" violations of Section 7 of the Act and under which it has, in fact, frequently secured divestiture.[7]

Nonetheless, the Ninth Circuit found Section 16's reference to injunctive relief "ambiguous" and proceeded to fashion a rigid rule based entirely on slender threads of legislative history. This history consists of fragmentary colloquies of individual members of the House Judiciary Committee to the effect that they did not believe Section 16 would authorize private suits for "dissolution" of a corporate defendant. 518 F.2d at 922. Based upon their references to "dissolution of the trusts," particularly of the Standard Oil Trust, and upon its own view that the remedy granted in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), was actually "divestiture," the Ninth Circuit concluded that the concept of "dissolution" includes "divestiture." 518 F.2d at 923-24. Tacitly generalizing from the individuals to the House group and from that to the whole of Congress, the court finally concluded that divestiture is not a remedy available under Section 16.

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[7] *See Citizen Publ. Co. v. United States*, 394 U.S. 131 (1969); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

This final conclusion is, even in terms of legislative history alone, dubious. None of the remarks on which the court relied found their way into committee reports, which presumably reflect some degree of consensus on otherwise personal views; both the Senate and House Committee Reports on Section 16 are completely silent on the issue of private divestiture. S. Rep. No. 698, 63d Cong., 2d Sess. (1914); H. R. Rep. No. 627, 63d Cong., 2d Sess. (1914). Moreover, the statement of one Senator on the floor, that "[s]ection [16] authorizes persons and corporations to bring suits in equity against those violating the antitrust laws *in all things, as section 4 of the Sherman Law authorizes the government to do so,*" 51 Cong. Rec. 14,215 (1914) (remarks of Senator Shields) (emphasis added), suggests that the views of the individuals on whom the Ninth Circuit relied did not represent a consensus of Congress as a whole; for at the time this statement was made, the government had already established its right to dissolution (or divestiture) under Section 4. *Standard Oil Co. v. United States, supra; United States v. American Tobacco Co., supra.*

Furthermore, even the colloquies on which the Ninth Circuit relied are ambiguous. There is evidence that those who opposed private suits for "dissolution" were using the word to mean complete dismantling of the corporation. Most of their remarks were directed at a proposal which contemplated the appointment of a receiver in dissolution. *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. (1914) at 843. In addition, the use of of the phrase "divest itself of the stock" in Section 11(b) of the Clayton Act suggests that Congress in 1914 could and did make precise distinctions between dissolution and divestiture.

Thus, the legislative "history" of private divestiture under Section 16 is at best inconclusive. When the Ninth Circuit's dubious process of relying exclusively on such a scanty and inconclusive history is added to the facts that Section 16 is seemingly clear on its face and that all other indicators—judicial and academic opinion, antitrust policy and basic premises of equity—point the other direction, the novelty, the error and need for review of its rule against private divestiture are clear.

III.

There Is a Split of Judicial Opinion on the Availability of Divestiture Which Requires Resolution by This Court.

The Ninth Circuit's specific disapproval of the indirect divestiture granted in *American Crystal Sugar Co. v. Cuban American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958), immediately introduced something of a split between circuits, for the Second Circuit had in that case approved the decree without difficulty.

Within a year, an even more pointed rift appeared. In *NBO Industries Treadway Cos. v. Brunswick Corp., supra,* the Third Circuit sharply criticized the Ninth Circuit's flat prohibition of private divestiture. While it agreed that "many members of the Senate and House Committees . . . assumed that § 16 did not create a private divestiture remedy," the Third Circuit disagreed with the role given to their assumptions. 523 F.2d at 278. Said the court:

> "It is quite another question whether legislative history from 1914, strong as it appears, should control the contemporary application of a statute

laying down a fundamental national economic policy. This is especially true when the significance of the circumstances to which application is sought were perceived dimly, if at all, at the time of passage. The antitrust laws are of necessity statements of general principle. They must be given meaning in specific applications on a case-by-case basis. It is impossible for a legislature to devise codes so all-encompassing as to predict every case to which the general principle should apply. So, too, with antitrust remedies. There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes which are almost an economic constitution for our complex national economy." *Id.* at 278-79.

Since the Third Circuit was merely providing guidelines for remand of a case in which it felt divestiture would not be appropriate, these comments are *dictum*. But they are nonetheless an unmistakable indication that the Third Circuit does not accept the Ninth Circuit analysis, and it is clear from an even more recent lower court case rejecting the Ninth Circuit rule that the Third Circuit is regarded as having split with the Ninth, and that plaintiffs in different areas of the country are being subjected to conflicting judicial interpretations of Section 16.

In *Fuchs Sugars & Syrups, Inc. v. Amstar Corp., supra,* the court was asked to strike the plaintiffs' request for divestiture from their complaint on the ground that divestiture is not available to private parties. The court described the issue posed as "difficult and unsettled" and observed that:

> "There is authority on both sides. . . . The Ninth Circuit has held that private parties may not obtain divestiture under § 7 while the Third Circuit, *in dicta,* indicates that this remedy is available." 402 F.Supp. at 638.

The court examined the admittedly "circumstantial evidence" used by the Ninth Circuit (518 F.2d at 922) and stated:

> "If 'circumstantial evidence' is to be afforded weight it is worthwhile to observe that in its original form the Senate Bill explicitly provided for Government power to press for total dissolution. The deletion of this section has not been read to suggest the intention to foreclose the relief. 'Nothing in the legislative history . . . suggests that the failure to authorize a private remedy of divestiture is of any greater significance than the failure to authorize a governmental remedy of divestiture.' Note, 43 Geo. Wash.L.Rev., supra at 268." 402 F. Supp. at 639.

Weighing the "inconclusive scraps of legislative history" against the criticism of the Third Circuit, against the "broad aim of the statutory scheme," as previously set forth by this Court, against the breadth of the stated power to award "injunctive relief," against the traditional latitude of equity courts to fashion appropriate remedies, and against the recognized importance and advantages of divestiture as a remedy, the court concluded that "divestiture is a potential remedy for private parties injured by violations of the Clayton Act." *Id.* at 639-40.

This conclusion and the criticisms of the Third Circuit reinforce the reasons for granting a writ set forth in the preceding points I and II. But even more impor-

tantly, they, together with the Second Circuit's prior approval of relief tantamount to divestiture, evidence a discord which is productive only of confusion and inequity and which is, therefore, itself a reason for granting a writ and finally settling the long labored debate over private divestiture.

IV.

The Availability of Attorneys' Fees Is Also a Question of Basic Antitrust Enforcement Policy Which Requires Resolution by This Court.

As discussed above, the private remedy provisions of the antitrust laws reflect a strong Congressional mandate to encourage private suits. As also noted, the task of complete enforcement is one that is not and cannot be performed by the government alone. Allowing those private parties who assist the government in this task the possibility of recovering a reasonable attorneys' fee comports with the established policy of encouraging and relying on their assistance in vindicating the public interest in free markets. Conversely, refusing fee recoveries absolutely is an effective deterrent to enforcement activity, and it is most effective in those cases where the threat to the competitive environment is most severe and the resources of the parties most unequal.

Antitrust suits are known for their length, complexity and expense. Hence, a blanket prohibition of fee awards *in injunctive actions*, for all practical purposes, denies the small businessman, who has historically assumed the principal position in private antitrust enforcement, access to the courts to prevent impending injury. It pressures him to abide anticompetitive conduct until such time as he has sustained sufficient monetary

damage to make recourse to the courts feasible. Consequently, such a prohibition undermines a basic purpose of Section 16, that of enlisting his aid to prevent competitive injury to the public and maintain a consistently competitive environment.

On the other hand, allowing private parties who assist the government in the task of maintaining open markets recognizes the parity of public importance between Section 4 of the Clayton Act, which explicitly provides for attorneys' fee payments to successful plaintiffs, and Section 16, which simply instructs the courts to do equity. Whether redress is sought in the form of damages under the former or an injunction under the latter, the substantive evils of unreasonable trade restraints, monopolies and anticompetitive acquisitions are the same. Indeed, in terms of service to the public, the fruits of a successful injunctive action are more direct and substantial than those of a damage claim. In the first place, a plaintiff's very right to relief under Section 16 is "conditioned by the necessities of the public interest which Congress has sought to protect." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. at 131, quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). In addition, by a suit under Section 16, the private plaintiff seeks to prevent or abate altogether continuing injury to the market rather than merely compensate himself for past wrongs.

Despite these ever-present factors, the Ninth Circuit, which had upheld an award of attorneys' fees under Section 16 in *ITT v. GTE*, felt compelled to deny it in the present case on the basis of the intervening decision of this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Alyeska, of course, did not involve an award of attorneys' fees in an antitrust suit. It involved an award to a group of environmentalists who had brought an action to restrain the issuance of certain rights-of-way and land use permits for the construction of the Alaska pipeline. Although the plaintiffs' initial success was ultimately vitiated by an Act of Congress designed to allow the permits, the court of appeals felt that they had acted as "private attorney generals" ensuring the proper functioning of the governmental system. On this basis, and admittedly without any statutory authorization, the court of appeals held the plaintiff entitled to attorneys' fees. 421 U.S. at 242-46.

Thus, the fee award in *Alyeska,* reversed by this Court, depended on a "far-reaching" exception to the "American rule" that a prevailing litigant is not ordinarily entitled to attorneys' fees. Under this far-reaching exception, any litigant who persuaded a court that he had brought suit under an important statute or had furthered a public policy could recover his fees. *Id.* at 247. After reviewing the general American rule and the exceptions to it, this Court determined that, without legislative guidance, it was inappropriate for the courts to reallocate litigation burdens completely by fashioning, as the court below had, an exception so all-encompassing as to constitute a "drastic new rule." *Id.* at 247-69. As the Court observed:

> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others. But it would be difficult, indeed, for the courts without legislative guidance to consider some statutes important and others unimportant

> and to allow attorneys' fees only in connection with the former. If the statutory limitation of right-of-way widths involved in this case is a matter of the gravest importance, it would appear that a wide-range of statutes would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant. . . ." 421 U.S. at 263-64 (emphasis added).

The Ninth Circuit did not explain why it viewed *Alyeska* as absolutely precluding an award of attorneys' fees under Section 16, but it obviously read *Alyeska* as limiting "private attorney general" awards to statutes which explicitly grant the right to an award by using the magic words "attorneys' fees." *See also Alphin v. Henson,* 5 Trade Reg. Rep. ¶ 60,880 (4th Cir. 1976) (apparently adopting a similar interpretation).

Such an interpretation of *Alyeska* seems unnecessarily broad. In the area of antitrust enforcement, the courts do have "legislative guidance" to consider Section 16 important. Indeed, it was enacted specifically to overcome judicial reluctance to allow private antitrust suits in equity. *See Paine Lumber Co. v. Neal,* 244 U.S. 459 (1917). Moreover, it was enacted to expand the remedies for violations of the very same substantive violations as Section 4 of the Clayton Act, which this Court cited in *Alyeska* as a prime example of Congress "opt[ing] to rely heavily on private enforcement to implement public policy." 421 U.S. at 263.

In view of the indicators of Congressional interest in private antitrust enforcement, allowing attorneys' fees under Section 16 would not involve the sort of judicial appropriation of unchecked discretion feared in *Alyeska.* Indeed, when these indicators are considered

with the traditional authority of equity courts to take account of overriding considerations of justice and to fashion relief so as to do equity, it seems clear the equity of Section 16 should follow the law of Section 4 and permit the recovery of attorneys' fees by those who actually and substantially fulfill the Congressionally ordained role of the bastion of antitrust enforcement.

Conclusion.

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the questions presented herein.

Respectfully submitted,

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APPENDIX A.

Memorandum Opinion and Order.

United States District Court, Central District of California.

Calnetics Corporation, Plaintiff, vs. Volkswagen of America, Inc., Volkswagen Pacific, Inc., and Volkswagen Products, Inc., Defendants. No. 70-2185-R.

Filed: June 30, 1972.

This matter come on for decision after trial by jury of damages claimed by plaintiff against defendants as the result of alleged violations of Section 7 of the Clayton Act [15 U.S.C. § 18], and trial to the court sitting without a jury to compel a divestiture of the acquisition of Delanair Engineering Co., Inc. by Volkswagen of America, Inc. on September 26, 1969.

THE PARTIES

Plaintiff CALNETICS CORPORATION (hereinafter referred to as CALNETICS) is a California corporation operating a group of related divisions engaged in the businesses of manufacturing and selling air conditioners, components and parts thereof, sheet metal fabrication, tool and part machinery, and plastic molding and extrusions. Plaintiff is the successor in interest to Sudmeier Engineering Corporation. Plaintiff complains here of antitrust violations affecting its Meier-Line division in the manufacture and sale of air conditioners, components and parts thereof, for use in Volkswagen automobiles.

Defendants are various entities engaged in the distribution of Volkswagen automobiles within the United States. Defendant VOLKSWAGEN OF AMERICA, INC. (hereinafter referred to as VWoA) is a New Jersey corporation. It is a wholly owned subsidiary of VOLKSWAGENWERK, A.G., a German corporation, the manufacturer of Volkswagen automobiles in Germany. VWoA imports Volkswagen. Porsche and Audi automobiles in the United States for sale through fourteen distributorships set up regionally throughout the United States. Five of these distributorships are wholly owned subsidiaries of VWoA. The remaining nine are independently owned and operated.

VOLKSWAGEN PACIFIC, INC., a California corporation, (hereinafter referred to as VPI) is an independently owned and operated distributor of Volkswagen, Porsche and Audi automobiles in Southern California, Southern Nevada, Arizona and Hawaii.

VOLKSWAGEN PRODUCTS, INC., a Texas corporation, (hereinafter referred to as VPC) is the successor in interest to DELANAIR ENGINEERING CO., INC. (hereinafter referred to as DELANAIR). DELANAIR and its successor VPC have engaged in the manufacture and sale of air conditioners, components and parts thereof, for use in automobiles. DELANAIR was acquired by VWoA on September 26, 1969, as a wholly owned subsidiary, and has with its change of name to VPC remained so during all times material to this litigation. It is this acquisition which brings the parties before the court.

Other parties are brought before the court by way of counterclaim on behalf of VWoA but are not necessary to the issues to be decided herein and are therefore omitted from identification as parties.

THE LITIGATION

This litigation was commenced by the filing of a complaint by CALNETICS on September 28, 1970 charging defendants VWoA, VPI and VPC with violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] and defendant VWoA with violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. Plaintiff sought damages and injunctive relief resulting from the claimed violations of the antitrust laws of the United States.

During the pretrial proceedings of the action, the Court, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, severed the claimed violation of Section 7 of the Clayton Act [15 U.S.C. § 18] and the matter proceeded to trial against defendant VWoA upon those claims alone, reserving the remaining claimed violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] for later trial.

Defendants' alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18] is alleged to have damaged plaintiff by substantially lessening competition and tending to create a monopoly in the manufacture, distribution and sale of air conditioning systems for Volkswagen, Karmann Ghia and Porsche automobiles and the foreclosure of that market to plaintiff. The relationship created by the acquisition of DELANAIR by VWoA is claimed to destroy incentive to compete and deter new entry into the line of commerce foreclosed to plaintiff. The claim for damages proceeded to trial before the Court sitting with a jury and resulted in a judgment for directed verdict for defendant pursuant to Rule 50(a).

Proceeding without a jury the Court heard further evidence upon the equitable relief claims of plaintiff. After the completion of the evidence and summation of counsel, the Court submitted the matter for decision.

THE ISSUES

1. Does plaintiff have a claim for treble damages and/or injunctive relief for claimed violations of Section 7 of the Clayton Act?

2. What constitutes the line of commerce or product market?

3. What is the geographic territory or section of the country involved?

4. Does the acquisition of DELANAIR by VWoA violate Section 7 of the Clayton Act?

5. Is the proffered "failing company" defense available to defendant VWoA?

THE FACTS

The CALNETICS story commences, for the purposes of this litigation, with the increasing recognition during the 1960s of a need for an air conditioner compatible to Volkswagen automobiles with their low horsepower and rear-mounted air-cooled engines.

CALNETICS in its MEIER-LINE division completed its development in 1967 in what it considered a unique air conditioner compatible to low horsepowered automobiles. This development, so far as CALNETICS was concerned, was limited to a compressor unit and clutch assembly designed to minimize the horsepower drawn from the automobile engine. All other parts of the air conditioner marketed by CALNETICS were standard items available from manufacturers engaged

in the business of marketing components and parts in the general air conditioner field. CALNETICS was then an assembler of standard parts into an air conditioning unit adaptable to low horsepower automobiles of foreign and domestic manufacture. CALNETICS, however, chose during 1967 and 1968[1] to limit itself to manufacture (in the assembly aspect of manufacturing) of air conditioning units for the Type I automobile in the Volkswagen family.[2] This limitation resulted from two factors—1. the limited production facilities of CALNETICS,[3] and 2. a recognition that Volkswagen automobile owners represented the best available market to exploit this new development in automobile air conditioning.

Competitively, CALNETICS entered a market then (1967-68) being supplied by DELANAIR and DPD[4] with very negligible market intrusions in various Volkswagen and Porsche models by ARA, PARKOMAT, NOVI, BEHR and COOLAIRE. The marketing potential[5] as recognized as exploited by CALNETICS in these early stages of production was twofold—1. inde-

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[1]In 1967 CALNETICS sold 317 units and in 1968 sales amounted to 988 units.

[2]The Volkswagen family of automobiles include Type I—the commonly referred to "bug" or "beetle" and Karmann Ghia; Type II—the bus or van; Type III—the fastback or squareback; Porsche 911; and Porsche 912.

[3]Production capacity was limited to 2 units per day.

[4]1967: DELANAIR sold 23,620 units accounting for 85.5% of the market. DPD sold 3700 units accounting for 13.4% of the market.

1968: DELANAIR sold 37,127 units accounting for 82.3% of the market. DPD sold 7000 units accounting for 15.5% of the market.

[5]At one time it was estimated that there were 1,250,000 Volkswagen Type I automobiles on the road without air conditioning.

pendent distributors of automotive products,[6] and 2. Volkswagen dealers franchised by VPI to sell the Volkswagen family of automobiles within the VPI territory. In addition to these markets, CALNETICS through its then president WILLIAM SACHKO was undertaking activities[7] which would in late 1967 result in the entire production of CALNETICS being assigned to VPI directly for distribution to Volkswagen dealers in the VPI marketing area. Mr. SACHKO'S machinations brought CALNETICS to the position as the exclusive supplier for VPI and lost to CALNETICS the future potential of marketing its air conditioners with independent automotive accessory distributors. The sales efforts[8] of then Sales Manager (and later President) of the MEIER-LINE division of CALNETICS, Mr. CHARLES HOWSEMAN, were completely nullified by Mr. SACHKO. All of these negotiations with VPI were carried on by Mr. SACHKO without consultation with Mr. HOWSEMAN.

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[6]These independent automotive products distributors sold directly to a purchaser of a Volkswagen automobile or in some instances to Volkswagen dealers for dealer installation of the air conditioner in a Volkswagen automobile.

[7]These activities included the negotiation and execution of an agreement with ROLF W. CHRISTIANSEN, parts service manager for VPI, to pay R.W.C. Sales Corporation (owned by Christiansen and Philip Ballingal, his assistant) a commission of 3% of the gross sales of air conditioners, components and parts thereof to VPI. Rolf W. CHRISTIANSEN was described during the trial as "a dominating factor in the selection of Meier-Line air conditioners purchased by Volkswagen Pacific."

The sales so made cannot be excluded for purposes of determining a total market for Section 7 considerations, but because of the source are excludable in any consideration of the damage issue presented by CALNETICS.

[8]Mr. HOWSEMAN had negotiated distribution agreements with several independent distributors of automobile accessories throughout California which in November 1968 were unilaterally cancelled by CALNETICS.

In 1969 CALNETICS, now armed with an exclusive VPI contract, moved to a new production facility and began full production in June of that year to meet the demands being made upon it by VPI. Increases were in fashion. Production increased, sales increasd[9] and so did the problems, both financial and quality of product. Warranty claims and dealer complaints reached such a point that by the time production facilities had been developed to the capacity of the anticipated potential of increased sales, VPI was compelled to, and did begin to offer both DPD and MEIER-LINE air conditioners to its Volkswagen dealers. DPD's competitive intrusion into the VPI territory was not only aided by CALNETICS' failures but also with the quality problems being simultaneously experienced by DELANAIR.

DELANAIR'S story is equally interesting. DELANAIR started its existence sometime prior to 1963 as a division of Overseas Motors Corporation of Fort Worth, Texas, manufacturing air conditioning units as an add-on[10] primarily for Jaguar, Rolls-Royce and Volkswagen automobiles. Sometime in 1963 a British Company, DELANEY-GALLEY, became interested in and did acquire the air conditioner manufacturing division of Overseas Motors and incorporated Delanair Engineering Co., Inc. as a subsidiary of DELANEY-GALLEY to succeed to the business of this division. Though the acquisition by DELANEY-GALLEY was to obtain expertise in the air conditioning field, it soon found itself with an operating and profitable[11]

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[9]1969 sales for CALNETICS amounted to 4,134 units sold exclusively to VPI.

[10]An "add-on" unit is one not designed for installation as an integral part of the design configuration of an automobile.

[11]DELANAIR gross sales for 1967 were $4,213,000. In 1968 gross sales jumped to $7,248,000. During these years

(This footnote is continued on next page)

business in the United States. Because of restrictions by the British government of the export of money,[12] the financing of DELANAIR'S operations was accomplished by United States bank loans guaranteed by LINDUSTRIES, LTD., the British parent corporation of DELANEY-GALLEY. That guarantee extended a line of credit to DELANAIR in the sum of $1,500,-000.

DELANAIR in 1968 experienced sales of 37,127 air conditioning units for Volkswagen and Porsche automobiles. These sales were accomplished through VWoA, who had by that time become DELANAIR'S only customer.[13] But like CALNETICS, quality problems increased throughout the spring and summer of 1968. During 1968 VPI ceased to purchase DELANAIR air conditioners from VWoA and substituted DPD. Later MEIER-LINE was added and eventually became the primary line of VPI air conditioner offerings.

By June of 1969 the problems had reached such proportions that in the advent of the air-conditioning season[14] of 1969 sales had come to a virtual standstill. Recognizing the acute nature of the problems being experienced the president of DELANEY-GALLEY was commuting monthly from England to Fort Worth, Texas during late 1968 and 1969. Buying management and technical knowhow in 1963, DELANEY-

DELANAIR accounted for more than 40% of the total sales of DELANEY-GALLEY.

[12]An English company was required to pay a 26% penalty for the export of money from England, i.e., every dollar sent from England actually cost the English company $1.26.

[13]In the year ending September 28, 1968 VWoA accounted for 97% of the sales of DELANAIR. VWoA in turn offered for sale these air conditioners to Volkswagen distributors, both independent and its own subsidiaries throughout the United States.

[14]The air-conditioning season is generally considered in the automobile industry to peak from May to October.

GALLEY now found it necessary to relieve the president, production manager and quality control manager of their duties with DELANAIR in March 1969. VWoA was enlisted in a sales campaign to bolster the sagging finances of DELANAIR. On July 14, 1969 VWoA was approached—with negative results—in an effort to alleviate the problem by urging the purchase of DELANAIR by VWoA.

Faced with the reality of curtailed income which would require DELANEY-GALLEY and/or LINDUSTRIES, its parent company, to provide cash or further credit[15] by American financial institutions to meet impending calls on $1,300,000 in obligations to the Fort Worth National Bank and operating capital to weather the crisis, Mr. DENNIS HARWOOD-JONES, the president of DELANEY-GALLEY recommended to his Board of Directors the sale of the DELANAIR subsidiary.[16] Reciting these enumerated reasons, Mr. HARWOOD-JONES, in total candor, further testified at the trial:

> "We had no desire to have a manufacturing operation of this size in the American market. We initially set out to acquire the knowledge for our own use in England and to enable us to manufacture a satisfactory unit to the American comfort standard for American automobile manufacturers to add to their vehicles on the production line.

[15]There was no question that LINDUSTRIES had the capability to provide the needed capital (estimated at $450,000) to continue the operations of DELANAIR. In 1969 LINDUSTRIES had total gross revenues of about $65,000,000 and DELANEY-GALLEY about $15,000,000.

[16]Mr. HARWOOD-JONES reported to his Board of Directors anticipated losses of $800,000-$1,000,000 and a likelihood that DELANAIR would not be able to meet current commitments to creditors.

"We had no desire to indulge in an after market type of unit, and the fact that we had acquired this knowledge and were already achieving a capability, had been satisfied, and was a major point in determining to sell this company."

Given the responsibility of selling DELANAIR before the end of the then current trading year,[17] Mr. HARWOOD-JONES first approached DPD as the most likely company to be interested in the acquisition. On July 24, 1969 DPD Company evidenced by letter its intent to purchase DELANAIR, the purchase to be closed September 1, 1969. This agreement temporarily ended the search for a buyer.

During August 1969 DPD attempted, unsuccessfully, to conclude financial arrangements[18] which would permit the purchase to be accomplished on September 1, 1969. The date was extended to September 15, 1969, but giving DELANEY-GALLEY the option to look for purchasers elsewhere. Mr. HARWOOD-JONES then approached JOHN STUART PERKINS, President of VWoA, requesting financing of DELANAIR by VWoA. The response of VWoA was negative.

Still attempting to meet his deadline, Mr. HARWOOD-JONES approached Lone Star Engineering Company, Fort Worth, Texas, and Behr, a manufacturer of air conditioners in Stuttgart, Germany, each with negative results. The asking price in these negotiations was between $750,000 and $1,000,000 and assumption of Bank of Fort Worth liability of $1,300,000 based upon Mr. HARWOOD-JONES' appraisal of the potential of DELANAIR as an operating company.

[17]September 27, 1969.

[18]Most important of these financial arrangements was $100,000 cash and discharge of the liability of LINDUSTRIES upon the $1,300,000 obligation at the Fort Worth National Bank.

With the reluctance, but not the inability, of DELANEY-GALLEY to aid its subsidiary financially during these times, the creditors were requested and unanimously cooperated to a delay in the payment of the current obligations due them from DELANAIR. HEATRANSFER, a new entry into the field of automobile air conditioning, was discounted as a potential buyer because of disapproval by DELANEY GALLEY of the HEATRANSFER method of cooling over the back of the automobile.

While these latter negotiations were being pursued, DELANEY-GALLEY continued its efforts to sell DELANAIR to VWoA. During his trip to Frankfort, Germany to contact BEHR, Mr. HARWOOD-JONES again talked to Mr. PERKINS and now elicited some personal interest from him. The discussions were continued in London, England and on September 24, 1969, the discussions were continued at the home offices of VWoA in Englewood Cliffs, New Jersey. With three days of negotiations the persuasion was irresistible and on September 26, 1969 the acquisition of DELANAIR by VWoA became a reality. Almost immediately DELANAIR became VPC and VWoA now had, within its own organization, the manufacturing capability to supply its channels of distribution of air conditioners for its automobiles.

With new management,[19] new financing,[20] new name,[21] and intensive sales effort,[22] VPC began the

[19]A product of Volkswagen organizational training from 1950, Mr. Gerold Fray Schlager was transferred from Volkswagen Southeastern Distributor, Incorporated, a subsidiary of VWoA and installed as Vice President and General Manager of VPC.

[20]VWoA advanced interest-free to VPC the sum of $545,000.

[21]The name DELANAIR was changed to VPC. DELANAIR like MEIER-LINE were names that had reached the brink

(This footnote is continued on next page)

climb back in dominance of the competitive Volkswagen air conditioner market. From the low 1969 market position—24,149 and 52.4% of the Volkswagen air conditioner market—the dramatics of the acquisition was evidenced in 1971 when 68,211 units or 71.0% of the market were VPC sales. In less than two years VPC had not only completely deliminated CALNETICS as a competitor in VPI's procurement of Volkswagen automobile air conditioners but had made significant impact on the competitive positions of DPD, HEATRANSFER and COOLAIRE.[23]

Recognizing the competitive realities of the loss of exclusivity of the VPI market and the limited funds available to it, CALNETICS turned to a search for new—and the recapture of old—customers. Increasing the scope of its product line CALNETICS with its

of anathema in the Volkswagen automobile air conditioning field.

[22]Demonstrative of the intensity of sales effort by VWoA are the discussion of Mr. JOHN STUART PERKINS, President of VWoA and GUENTER KITTEL, Vice President—Parts of VWoA, which prompted Mr. KITTEL to memorialize as:

> ". . . Mr. Weill promised that he will join our marketing efforts. . . ."

The Mr. WEILL referred to is Mr. SAMUEL WEILL, JR., President of VPI.

Concurrently with the acquisition—September 26, 1969—all Volkswagen distributors in the United States were informed with the announcement of a 1970 modified version of Type I and Type IiI air conditioners by Mr. JOHN STUART PERKINS, President of VWoA.

Announcements were made that Volkswagen was in the air conditioning business.

More significantly, this market reversal was accomplished with little, if any, improvement in the air conditioner produced by DELANAIR in 1968 and 1969.

[23]Between 1970 and 1971—the first year of effective operation of the VPC manufacturing facility—market position reductions—DPD from 36.9% in 1970 to 26.0% in 1971—Meier-Line (CALNETICS) from 3.5% to .4%—HEATRANSFER from 7.3% to 2.3%—COOLAIRE from .5% to .3%—were significant.

limited resources—attempted to capture, in some degree, the air conditioner market for all compact automobiles of both foreign and domestic manufacture.[24] The summer of 1969 was too hot for CALNETICS air conditioning endeavors and on December 4, 1969 CALNETICS met its creditors to review its operating status and attempt to stave off bankruptcy, voluntarily or involuntarily threatening it. These efforts have been successful and CALNETICS remained sufficiently viable at the time of trial to continue its competitive efforts on a curtailed basis selling air conditioners for Volkswagen automobiles.

With these facts as some background of the litigative stance of the parties, the Court now proceeds to determination of the issues presented.

1. Standing of Plaintiff.

Corporate mergers and acquisitions are proscribed in the anticompetitive sense by Section 7 of the Clayton Act [15 U.S.C. § 18] which provides in its pertinent part:

> "§ 18. Acquisition by one corporation of stock of another.
>
> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[24]CALNETICS holds itself out as having the capacity to produce air conditioners for Volkswagen, Porsche 911 and 912, Toyota Corona, Toyota Corolla, Toyota Mark II, Vega, Opel and Pinto.

VWoA proposes as a threshold issue the standing of CALNETICS to maintain a suit either for damages or injunctive relief (divestiture) for alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18].

Early in its consideration of antitrust legislation, the Congress provided a remedy to those private individuals damaged by reason of antitrust violations. The surviving treble damage remedy is found in Section 4 o fthe Clayton Act [15 U.S.C. § 15] which provides in its pertinent part:

> "§ 15. Suits by persons injured; amount of recovery.
>
> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

Concurrently with this final enactment of the treble damage provision of the Clayton Act, which has survived since 1914, the Congress recognized that damages did not provide a totality of relief necessary to curb the lasting effects of continued anticompetitive conduct and enacted Section 16 of the Clayton Act [15 U.S.C. § 26] to provide for equitable relief in appropriate cases brought by private individuals. It provides in its pertinent part:

> "§ 26. Injunctive relief for private parties; exception.
>
> Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws including sections . . . 18, . . . of this title, when and

> under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

The history of private litigation in antitrust matters has created a plethora of unquestioned authority in the area of Sherman Act violations. But in spite of the clear language of both Section 4 [15 U.S.C. § 15] and Section 16 [15 U.S.C. § 26] of the Clayton Act, defendants have, with some modicum of success, convinced courts that there exists no private right to maintain an action for damages suffered or equitable relief required from alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. VWoA here urges upon the Court the same position. Scrutiny of the decided cases, however, indicates that this contention is neither persuasive nor compelling.

In *Continental Securities Co. v. Michigan Cent. R. Co.*, 16 F.2d 378 (6th Cir. 1926), cert. denied, 274 U.S. 741, the court does say at page 379 in clear and explicit language:

> "It is now settled that a private suitor cannot invoke the aid of a court of equity to enjoin a violation of the Sherman Anti-Trust Act. . . .
>
> "The plaintiff gets no help from the Clayton Act. . . ."

But, the later explanation by the court makes clear that the status of the plaintiff as a stockholder was its prime concern. In proscribing a derivative claim by a stockholder to preclude recovery for antitrust injury to his corporation, the court says:

> "The other reason is that the favor of Section 16 extends only to injunctive relief to be given

> to 'any person * * * against threatened loss or damage'. This is not appropriate language to reach such a suit as this, in which a stockholder files a representative suit, and apprehends no 'threatened loss or damage' save that which comes through the damage to his corporation. . . ."

American Commercial Barge Lines Company, et al. v. Eastern Gas and Fuel Associates, et al., 204 F. Supp. 451 (S.D. Ohio 1962) merely as a conclusion of law without further authority:

> "5. An action cannot properly be brought by a private litigant under Section 16 of the Clayton Act, 15 U.S.C.A. § 26 for divestiture of assets allegedly acquired in violation of the antitrust laws."

In view of the clear language of Section 26 that "any person . . . shall be entitled to sue for and have injunctive relief" the only rational reading of *American Commercial Barge Company, supra,* would lead to the conclusion that the court was concerned with primary jurisdiction of the Interstate Commerce Commission and applied the exception provided in Section 16 proscribing private suit in matters within the jurisdiction of the Interstate Commerce Commission.

Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964)[25] note 3[26] at page 728

[25]See the prologue and epilogue in 221 F. Supp. 15 (E.D. Mo. 1963) and 238 F. Supp. 561 (E.D. Mo. 1965) respectively.

[26]Note 3 says:

> "3. We think that any effort to convert Section 7 of the Clayton Act into a *per se* violation of the antitrust laws so as to give use to a private right of action under the Clayton Act has been squarely checked by what is said by Mr. Chief Justice Warren in *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S. Ct. 1502, 8 L.Ed.2d 510. As interpreted in that case, Section 7 of the Clayton Act does not condemn all mergers, but only those having demonstrable anticompetitive effects. The statute deals with clearcut menaces to competition, not with accomplished monopolies, presently creating damage to a competitor, which is a *sine qua non* of a private right of action under Section 5 of the Clayton Act.
>
> Section 7 of the Clayton Act was intended to supplement the Sherman Act and:
>
> > 'primarily to arrest apprehended consequences of intercorporation relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case'
>
> *United States v. duPont & Co.*, 353 U.S. 586 at 597, 77 S. Ct. 872, 1 L.Ed.2d 1057. See this same case, 366 U.S. 316, 325-329, of S. Ct. 1243, 6 L.Ed.2d 318. That no private right of action accrues from such a violation, see: *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963); *United States v. Continental Can Co.*, 217 F. Supp. 761, 767 (S.D. N.Y. 1963); *United States v. Ingersoll Rand Co., et al.*, 218 F. Supp. 530 (W.D. Pa. 1963), aff'd. 320 F.2d 509 (3d Cir. 1963); *Gottesman v. General Motors Corp.*, 221 F. Supp. 488 (S.D. N.Y. 1963)."

evinces a concern of the court in the kind of injury that a private litigant must show rather than a lack of available relief. The decision of the case is made, not on the absence of a private right, but upon the fact that the trial court had erroneously applied the statute of limitations to a single act of "acquisition" or "price-cutting" rather than as a course of conduct.

Limiting its consideration, and relying upon the analysis of Judge Pence in *Bailey's Baker, Ltd. v. Continental Baking Company,* 235 F. Supp. 705 (D.Hawaii 1964), the court in *Isidor Weinstein Investment Co. v. Hearst Corporation,* 303 F. Supp. 646 (N.D. Cal. 1969) precluded a claim for money damages for alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. The language quoted from *Bailey, supra,* at page 650, is significant:

". . . In Bailey's . . . District Judge Martin Pence stated:

> Since Clayton § 7 is concerned with the future monopolistic and restraining tendencies of corporate acquisition, i.e., probable (and hence not certain) future restraints on commerce, any damages claimed for prospective restraint of trade would be purely speculative, and a plaintiff cannot recover money damages for anticipated but unimplemented acts of restraint which may invade its interests. *While Clayton § 7 permits private injunctive and divestiture actions in* merger situations which may result in the proscribed restraints or monopolies, nevertheless, no private action for treble damages accrues from a Clayton 7 acquisition. . . ." (Emphasis ours.)

Judge Pence was postulating the difficult and, to him, legally impossible task of proof of causal connection between an acquisition and claimed damage of a competitor. The recognition of available injunctive relief is clear. Interestingly enough, five years later, recognizing the error and reminded by the admonition of Mr. Justice Frankfurter,[27] Judge Pence recants in *Kirihara v. Bendix Corporation,* 306 F. Supp. 72 (D.Hawaii 1969) and concludes at page 88:

> ". . . [T]his court is *now* convinced that to hold that Congress never intended the deterrent effect of § 4 to have any application to acquisi-

[27]"Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

Dissenting in *Henslee v. Union Planters National Bank & Trust Company,* 335 U.S. 595, 93 L. ed. 3d 259, 69 S. Ct. 290.

> tions which might violate § 7 upon completion would absolutely negate the contrary inference which must be drawn from the fact that Congress has left § 4 unchanged and uncircumscribed since 1914. This court now concludes that it threw too wide a loop when it said in 1964: 'No private action for treble damages accrues from a Clayton § 7 acquisition'. 235 F. Supp. at 717.[28]

Reading the clear language of Sections 4 [15 U.S.C. § 15] and 16 [15 U.S.C. § 26] of the Clayton Act and reviewing the comprehensive analysis of *Kirihara, supra,* pp. 80-88 compels the conclusion that CALNETICS is properly before the Court in its damage claims and its request for injunctive relief required by the acquisition of DELANAIR by VWoA in violation of Section 7 of the Clayton Act [15 U.S.C. § 18].

Standing has yet another aspect. Private claimants under the antitrust laws must show that *they*—even though given the status of private attorneys-general suffered some injury to "business or property" as distinguished from public injury[29] resulting from anticompetitive practices. VWoA contends that CALNETICS falls short of this requirement since Section 7 of the Clayton Act [15 U.S.C. § 18] concerns itself with anticipated and prospective antitrust consequences and, as such, damages are inappropriate. The argument

[28]See also *Gottesman v. General Motors Corp.,* 414 F.2d 956 (2d Cir. 1969) reversing 221 F. Supp. 488 (S.D. N.Y. 1968) and *Isidor Weinstein Investment Co. v. Hearst Corporation,* 310 F. Supp. 390 (N.D. Cal. 1970) the sequel to 303 F. Supp. 646 (N.D. Cal. 1966).

[29]The role of Don Quixote in protecting the honor of fair damsel "PUBLIC" is left to the Attorney General of the United States by statute and government's traditional role as parens patriae.

is adequately answered in *Kirihara, supra,* and needs no amplification here. That, however, is not determinative of the standing of CALNETICS for equitable relief. Injunction and/or divestiture are concerned with the future. Actual present damage need not be shown as the predicate for such relief. *Zenith Radio Corporation v. Hazeltine Research, Inc., et al.,* 395 U.S. 100, 23 L.Ed.2d 129, 89 S. Ct. 1562 (1969).

The evidence of individual as opposed to public injury is abundant. CALNETICS is a company engaged in the marketing of air conditioners for Volkswagen automobiles as is VPC, the acquired company. It is, in reality (though not the most effective) a competitor in the marketplace. The viability of CALNETICS—as David or Goliath—is not determinative of its standing to prosecute this action. So long as it remains an active entity, ready, willing and able to sell its goods CALNETICS has standing in fact to maintain this action.

2. The Product Market.

An essential inquiry in the determination of a violation of Section 7 of the Clayton Act [15 U.S.C. § 18] is the delineation of the line of commerce or product market. It is essential because "the product" defines the competitive environment to which the protection of Section 7 is extended.[30] Reported cases have largely been limited to governmental concerns for the protection of competition where courts have narrowed and broadened the product market without real criteria or consistency. The dilemma is evident in the language of Mr. Justice Stewart in *United States v. Von's Grocery*

[30]*United States v. Penn-Olin Chemical Co., et al.,* 378 U.S. 158, 12 L.ed.2d 775, 84 S. Ct. 1710.

Company, 384 U.S. 270, 16 L.Ed.2d 555, 86 S. Ct. 1478 (1966):

> ". . . The sole consistency that I can find is that in litigation under § 7 the Government always wins. . . ."

The literature[31] discussing Section 7 of the Clayton Act [15 U.S.C. § 18] enumerates line of commerce considerations as threefold—1. reasonable interchangeability of use, 2. cross elasticity of demand,[32] and 3. peculiar characteristics and uses.[33] The distinctions are purely semantic. Analysis of competition must be predicated on the product involved. Perhaps a more realistic view would be to couch the test in terms of a single consideration of the product or its "equivalents".[34]

VWoA maintains that the test applicable here is the broad market of automobile air conditioners as defining the relevant product market. Analysis shows the fallacy of the assumption. Although there is a kinship (in that they accomplish the same purpose—cool the automobile) between a Buick air conditioner and Volkswagen air conditioner, the relationship is purely "shirttail". Even the relationship of Volkswagen air conditioners to those of domestic and foreign low-horsepowered automobiles[35] lends no aid to VWoA's position—they simply are not interchangeable, i.e., they are not equivalents. The evidence shows that an air

[31]Including court decisions.

[32]Both reasonable interchangeability of use and cross elasticity of demand were first articulated in *United States of America v. E. I. DuPont DeNemours & Company,* 351 U.S. 377, 100 L.ed. 1264, 76 S. Ct. 994 (1955).

[33]*United States of America v. E. I. DuPont DeNemours & Company, et al.,* 353 U.S. 566, 1 L.ed.2d 1057, 77 S. Ct. 872 (1957).

[34]There appears to be no good reason that the patent law should have a monopoly on "equivalents".

[35]Pinto, Vega, Duster, Toyota, Opel and the like.

conditioner designed to operate in a Volkswagen automobile,[36] with its air-cooled, rear-mounted engine, will simply not operate without modification or substitution of parts, in any other automobile now operating on the highways of the United States. Equivalents cannot be broad brushed to minimize or maximize a relevant product market. Limitations are necessary to make the considerations reasonably reflect what actually happens in the marketplace. Certainly no one can argue that the air conditioner marketed for Volkswagen automobiles by VPC, or any other supplier, would be purchased by anyone other than those who own one of the Volkswagen family of automobiles. Concern for the realities of the marketplace was expressed by the Supreme Court in defining the relevant product market in *Times Picayune Publishing Company, et al. v. United States of America*, 345 U.S. 594, 97 L.ed. 1277, 73 S. Ct. 872 (1953). In *Times Picayune, supra,* Mr. Justice Clark writing for the majority voices this concern in note 31 as:

> "31. For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms products whose 'cross elasticities of demand' are small. . . ."

VWoA further suggests that because CALNETICS' manufacturing facilities are capable of producing other air conditioners with "little modification" the relevant

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[36]Including the "Volkswagen family" of automobiles—Porsche and Karmann Ghia.

market is somehow defined more broadly. VWoA would have this Court so read *United States of America v. Columbia Steel Company,* 334 U.S. 495, 92 L.ed. 1533, 68 S. Ct. 1107 (1948). VWoA misreads the *Columbia Steel* case, *supra.* Though there is a passing reference to the interchangeability of manufacturing facilities it is not the holding or rationale of the case. The Supreme Court's consideration in *Columbia Steel, supra,* was the impact the withdrawal of Consolidated Steel Corporation (the acquired company) as a buyer on the open market would have on the producers of rolled steel products. In that context the Court makes reference to the capacity of a rolled steel producer to employ the same facilities to "make other products interchangeably with shapes and plates," products within the rolled steel products being offered in the marketplace. Nowhere in the opinion does the Court lay down, or suggest, a rule that interchangeability of *production facilities* affects the consideration of a relevant product market. No other authority has been cited and none has been found by this Court that suggests that relevant product market should be measured by the capacity of the producer rather than the *product he sells* in the marketplace. Competition, by its very definition, must be measured by the marketplace of the same or equivalent products. To hold otherwise would mean that a producer who decides to sell automobile air conditioners but is capable, with little or no plant changes, of producing refrigerator compressors is measured in the competitive marketplace by inclusion of refrigerators as part of the relevant product market. The statement of the hypothesis discloses its absurdity. Relevant market can be measured only to the product sold. Whether applied broadly

or as a permissible submarket[37] the relevant market in this case can be measured only by air conditioners sold for use in the Volkswagen family of automobiles by VPC, DPD, CALNETICS, HEATRANSFER and COOLAIRE.

3. The Geographic Market.

The second and somewhat overlapping consideration in measuring the effects of an acquisition is the geographic area of competition. In *Brown Shoe Co. v. United States*, 370 U.S. 294, 8 L.ed.2d 510, 82 S. Ct. 1502 (1962), the Supreme Court sets forth the critical inquiry as:

> ". . . The geographic market selected must therefore, both 'correspond to the commercial realities' of the industry and be economically significant." (At page 336)

Commercial reality in our consideration of the Volkswagen automobile air conditioner market shows that the acquired company, VPC, competes in varying degrees with DPD, CALNETICS, HEATRANSFER and COOLAIRE throughout the United States. More importantly, the consideration of a broad national market or a narrow regional market would compel the same result in the factual context of this case.

4. Violation of § 7 of the Clayton Act [15 U.S.C. § 18].

The genesis of Section 7 of the Clayton Act [15 U.S.C. § 18] in its present form can be summarized as the recognition by Congress that Sections 1 and

[37] *Brown Shoe Co. v. United States* [1962 TRADE CASES ¶ 70,366], 370 U. S. 294, 82 S. Ct. 1502, 8 L. ed. 2d 510 (1962).

2 of the Sherman Act[38] and the original enactment of Section 7 in 1914 were inadequate to maintain a free and strong competitive market in the United States. Mergers and acquisitions were being saved more by form than substance and began threatening to negate the concern of Congress expressed in its earlier enactment of antitrust legislation. With the enactment of the Cellar-Kefauver Antimerger Act,[39] Congress laid to rest the generally held view that the exclusive attack upon vertical mergers had to be upon the difficult and near impossible finding of violations of Sections 1 and 2 of the Sherman Act.[40]

The first consideration of a vertical acquisition of the stock of one company by another in response to new legislation was in *United States v. E. I. DuPont DeNemours & Co.*, 353 U.S. 586, 1 L.ed.2d 1057, 77 S. Ct. 872 (1957). Applying Section 7 of the Clayton Act [15 U.S.C. § 18] in its present form to the 1917-19 acquisition by the DuPont Company of 23 percent of the stock of General Motors the Supreme Court says:

> "We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not is within the reach

[38] 15 U. S. C. § 1 and 15 U. S. C. § 2 respectively.

[39] Antimerger Act of December 2, 1950. 64 Stat. 1125.

[40] *United States v. Yellow Cab Co.* [1946-1947 TRADE CASES ¶ 57,576], 332 U. S. 218, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947); *United States v. Columbia Steel Co.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495, 92 L. Ed. 1533, 68 S. Ct. 1107 (1947); *United States of America v. Paramount Pictures, Inc., et al.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 92 L. Ed. 1260, 68 S. Ct. 915 (1948).

See also F. T. C., Report on Corporate Mergers and Acquisitions, H. R. Doc. No. 169. 84th Cong. 1st Sess. (1955); H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly in any line of commerce. . . ."

VWoA argues that its acquisition of its captive supplier DELANAIR cannot affect the competitive position of CALNETICS vis-a-vis VWoA and there is therefore no violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. VWoA misses the point. Section 7 does not proscribe acquisitions which may damage or otherwise injure a particular participant in the market but rather condemns mergers or acquisitions which have the reasonable probability of restraining competition. CALNETICS' position in the marketplace as an actual competitor to VPC, or as a potential competitor in markets now claimed foreclosed, justifies the complaint as we have determined earlier. The injury here is twofold—damages and/or injunctive relief.

The antitrust laws were not enacted nor have they ever been implemented by the courts to secure to any producer of goods a private preserve for its own exploitation. The purpose of the antitrust laws is the preservation of competition and so the producer who legitimately encroaches upon the private market preserve of another can do so with impunity so long as its actions neither restrain competition nor tend toward monopoly. This is the command of Sections 1 and 2 of the Sherman Act and the provisions of the Robinson-Patman Act proscribing price discrimination. Section 7 of the Clayton Act presents a perplexing dichotomy in its application to litigation brought by private parties. Determination of damage and equitable relief claims must necessarily include vastly different considerations.

The position of an individual plaintiff in a Section 4 treble damage suit is individual, and impact must be viewed in the crucible of competitive effect on plaintiff's own private transaction in the market. Damages recoverable by a private antitrust claimant deal with actual, present and reasonably foreseeable effects of an anticompetitive merger on the business or property owned by plaintiff. CALNETICS has fallen short in its necessary proof of causal connection to its claimed loss of the VPI market and consequently a motion to dismiss has previously been granted by the Court.

Equitable relief presents different considerations. A case for divestiture is one in which a single competitor is but one element in the mosaic of competition. Divestiture affects all of the competitors in the marketplace and so all must be considered in the determination of violation vel non. Section 7 of the Clayton Act [15 U.S.C. § 18] was not enacted to equate "competition" with "survival" of a single entity but rather to provide the opportunity to freely enter and engage in the marketplace. In this respect there is no "target" at which to aim the anticompetitive acquisition. Competitors are victims of the fallout of the destruction of competition. A viable plaintiff competing in, or ready to enter into the marketplace gives the Court the cause for inquiry. The inquiry is the marketplace and the effects of the claimed anticompetitive acquisition upon the marketplace. For that a reason a Section 7 divestiture plaintiff acts somewhat as a Rule 23 class representative and need not satisfy the requirement of "impact" in its classical antitrust definition. In a nation that now exceeds one trillion, forty six billion dollars in gross national product government cannot possibly be relied upon to provide vindication of every person

or entity aggrieved by a violation of the antitrust laws. It must be left to private litigants to guarantee to themselves the assurance that the future will not repeat the past. Section 7 of the Clayton Act deals only with the future measured by reasonable probabilities of acquisition. It is that measure to Court applies here.

In the consideration of the probable effects of the acquisition of DELANAIR by VWoA, DELANAIR sales are markedly significant. As an independent subsidiary of DELANEY-GALLEY, DELANAIR had captured 85.5% of the Volkswagen air conditioner business by 1967. In 1968 DPD and CALNETICS reduced DELANAIR'S position to an 82.3% market share. With the problems of 1968 still lingering and intensifying in 1969, DELANAIR dropped to 52.4%. Significantly DPD and CALNETICS increased their respective positions to 32.5% and 8.9% and new entries HEATRANSFER and COOLAIRE contributed 5.4% and 6% respectively to the slide of DELANAIR. VWoA acquired DELANAIR September 26, 1969 and now as VPC the hold slipped to 51.8% in 1970. Viewed as a cold statistic it appears that the merger had no real effect on the Volkswagen air conditioner business. Not lost in the evidence, however, is the pessimistic picture drawn by Mr. HARWOOD-JONES that counsel for VWoA in another context would have the Court view as the certain demise of DELANAIR as a competitor in the marketplace. With little change in the unit being offered—but with the new name—new management—and new financing furnished by VWoA, VPC in 1971 took a giant step to 71.0% of the market. In the same period DPD dropped to 26.0% with the capacity and product that was considered by both VWoA and DELANEY-GALLEY as the most competitive product on the market. HEATRANSFER with 2.3%, CALNETICS with .4% and COOLAIRE with .3% had become for all practical purposes, nonexistent in Volkswagen automobile air conditioner production.

A dispassionate review of these facts leads to the inevitable conclusion that this acquisition is monopoly in its incipiency. As such, the acquisition is in violation of Section 7 of the Clayton Act [15 U.S.C. § 18].

To protect its acquisition from divestiture VWoA argues that its interest and investment in acquiring DELANAIR had considerations totally removed from scrutiny of the antitrust laws. It protests that faced with the events of late 1968 and the air-condition season of 1969, it was compelled to acquire DELANAIR—1. to guarantee a continued source of air conditioners and 2. to protect the Volkswagen reputation by offering an air conditioner qualitatively in keeping with Volkswagen excellence. Although this motivation finds some support in the evidence, high motivation and good faith does not rescue an otherwise anticompetitive acquisition from the attack of the antitrust laws. The concern of the courts in considering "beneficial" mergers or acquisitions is expressed in *Ford Motor Co. v. United States,* .... U.S. ...., 31 L.Ed.2d 492, 92 S.Ct. .... (1972) when the Supreme Court says:

> "It is argued, however, that the acquisition had some beneficial effect in making Autolite a more vigorous and effective competitor against Champion and General Motors than Autolite had been as an independent. But what we said in United States v. Philadelphia National Bank, supra, disposes of that argument. A merger is not saved from illegality under § 8, we said 'because on

some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anti-competitive mergers, the benign and the malignant alike fully aware, we must assume, that some price might have to be paid'. 374 U.S., at 371, 10 L.Ed.2d at 949."

Before leaving the subject, a word about the claim VWoA that it (as a buyer) was never a customer of CALNETICS, that it dealt exclusively with DELANAIR and therefore there is no change in the competitive market in Volkswagen air conditioners.

The distributive pattern of the Volkswagen family of automobiles is important to this consideration. VWoA, as a wholly owned subsidiary of VOLKSWAGENWERK A.G., manufacturer of Volkswagen automobiles in Germany, imports and distributes Volkswagen automobiles in the United States. Distribution is accomplished through fourteen regional distributors throughout the United States.

Although contemplated in the past and left to possibility in the future, Volkswagen automobiles do not have so-called OE[41] or factory installation of air conditioners. With the lack of factory installation, air conditioners can be installed—1. by VWoA, either on order of some distributor or upon its own plant

[41]O. E. is original equipment installed at the factory during assembly of the automobile.

installation ready for delivery to distributors, 2. by one of the fourteen regional distributors—again—on order of a dealer or upon its own plant installation ready for delivery to a dealer, 3. by the dealer on order of his customer, or 4. by some independent installer dealing in automotive products on purchase by an owner of a Volkswagen automobile, either in its new or used condition.

It takes little imagination and little or no expertise to recognize that, preferentially, air conditioners will be installed in Volkswagen automobiles in the descending levels of distribution. VWoA cites numbers in the millions of Volkswagens driving the highways of the United States as a potential market for CALNETICS and the other producers to put their efforts. Assuming this potential far outstrips the total sales of 996,000 Volkswagen air conditioners in 1971, the plain fact is that this potential has already passed the marketing efforts of the three preceding levels of distribution without success. More importantly, these levels can offer their wares under the tacit, if not express, imprimatur of the Volkswagen name. The vice of the distributive pattern as it must inevitably be affected by VWoA's acquisition of DELANAIR is the "clog on competition" condemned by Section 7 of the Clayton Act [15 U.S.C. § 18].

4. The Failing Company Defense.

VWoA would have the Court save its acquisition of DELANAIR by application of the failing company doctrine. In *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, 74 L.ed. 431, 50 S. Ct. 89, the Supreme Court first articulated a circumstance in which the elimination of competition by merger or acquisition could survive scrutiny under

Section 7 of the Clayton Act. Analyzing the facts surrounding the financial difficulties of the acquired company, the court says at page 302:

> "In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. . . ."

See also *Citizen Publishing Company v. United States*, 394 U.S. 13, 22 L.Ed. 148, 89 S. Ct. 927 (1969) emphasizing the narrow scope of the failing company doctrine.

VWoA falls short of its burden on both tests—1. the grave probability of business failure and 2. the unavailability of prospective purchasers. Financial statements of DELANAIR for the period ending August 30, 1969, just twenty-six days before the acquisition, show a net loss of $262,387. Carrying forward retained earnings from 1968 in the sum of $526,665, DELANAIR was still in a retained earnings surplus position of $312,278 at the time of its acquisition

by VWoA. Certainly DELANAIR was having its problems but accommodations had been made with its creditors and it had in the wings a capable, though unwilling, parent whose prime concern was to sell DELANAIR because "we had acquired this knowledge and were already achieving a capability". DELANAIR had served the acquired purpose for DELANEY-GALLEY. Having served its purpose and occasioning some concern, the decision to sell solved the problem.

VWoA fails to meet the second requirement also. DELANEY-GALLEY had in mind a well-defined route to follow in the offering of DELANAIR for sale. The route was defined by Mr. HARWOOD-JONES and his Board of Directors to obtain the best possible price for its American subsidiary. No effort was made to put the sale in the hands of a broker. Leads offered to Mr. HARWOOD-JONES were ignored because they were not the kind of people he thought could make the kind of arrangements he wanted. The press on VWoA to purchase DELANAIR was one considered in the best interest of DELANEY-GALLEY and single-mindedly Mr. HARWOOD-JONES obtained his objective in September, 1969. Never could VWoA be considered as the "only available purchaser" but rather as the best available purchaser. "Failing company" simply has no factual support in the evidence.

Armed with the confidence that relief in an antitrust case must be effective to redress the violation and to restore competition[42] the Court now calls upon

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[42] *Ford Motor Co. v. United States, supra.*

the parties to present plans for accomplishing the relief granted, said plans to be submitted to the Court within thirty (30) days of the filing of this memorandum and order.

Judgment is for the plaintiff upon the equitable relief prayed. Details of the divestiture to abide the further entry of a supplemental judgment adopting an appropriate plan.

This memorandum opinion and order shall be deemed Findings of Fact and Conclusions of Law as permitted by Federal Rules of Civil Procedure, Rule 52(a).

Dated: June 30, 1972

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX B.

Supplemental Memorandum Opinion and Order.

United States District Court, Central District of California.

Calnetics Corporation, Plaintiff, vs. Volkswagen of America, Inc., Volkswagen Pacific, Inc., and Volkswagen Products, Inc., Defendants. No. 70-2185-R.

Filed: January 19, 1973.

The acquisition by Volkswagen of America, Inc. (hereinafter referred to as VWoA) of the air conditioning business of Delanair[1] on September 26, 1969 was found by the Court to be in violation of the antitrust laws of the United States, Sections 4, 7 & 16 of the Clayton Act, [15 U.S.C. §§ 15, 18, 26]. That decision, filed June 30, 1972, *Calnetics v. Volkswagen of America, Inc.*, 348 F. Supp. 606, left for consideration the scope of the equitable relief to be granted to restore the competitive marketplace in air conditioners for Volkswagen automobiles.

The parties have been given the opportunity to present evidence and to fully argue to the Court the appropriate relief to be granted to overcome the anticompetitive effects of the acquisition.

VWoA has continued to oppose divestiture upon the ground that it—in the guise of VPC—is building the best available air conditioner for Volkswagen automobiles.[2] As compelling as that approach may seem, if

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[1]Delanair Engineering Co., Inc. has since changed its name to Volkswagen Products Corp. (hereinafter referred to as VPC).

[2]Volkswagen automobiles as used in the context in which VWoA presents its position to the Court includes Type I—the commonly referred to "bug" or "beetle" and Karmann Ghia;

(This footnote is continued on next page)

the market we were considering was the automobile sales of VWoA, it simply misses the mark completely in the consideration that relief from an antitrust violation must be effective in the restoration of *the competition affected* by the merger or acquisition. *United States v. du Pont & Co.,* 366 U.S. 316, 6 L.Ed.2d 318, 81 S. Ct. 1243 (1961); *Ford Motor Company v. United States,* 405 U.S. 562, 31 L.Ed. 492, 92 S. Ct. 1142 (1972). That competition is *air conditioners* for Volkswagen automobiles. *Calnetics v. Volkswagen of America, Inc., supra,* at 617-618. Competition in air conditioners must be restored, maintaining the divested company as a viable competitor in the marketplace without the aid of the protective practices of a parent who is its sole customer.

To attempt to restore competition as it existed prior to the acquisition, it is ordered that no later than six (6) months after the judgment herein shall become final,[3] VWoA shall divest itself of all interest in the assets and facilities of VPC for the production and distribution of air conditioners, parts and components thereof. Divestiture shall be accomplished in such manner that VPC and its production facilities shall remain as a going, viable and operating entity producing and distributing automobile air conditioners for Volkswagen automobiles. The divested assets shall include, but not be limited to, all the air conditioners, parts and components production and assembly facilities which were

Type II—the bus or van; Type III—the fastback or squareback; Porsche 911, Porsche 912 and Audi in its various models.

Also included in any use herein of the "Volkswagen automobile" appellation is any successor or replacement model of automobiles manufactured or produced in whole or in part by Volkswagenwerk A.G. its successors or assigns.

[3]Not subject to further appeal.

acquired by VWoA from Delanair Engineering Co., Inc. on September 26, 1969, together with all improvements, betterments, replacements and additions made thereto since such acquisition to the date of divestiture.

To guarantee the viability of the divested company, VWoA is required to use its best efforts to maintain the assets of VPC subject to divestiture as a going and viable concern engaging in the production and distribution of automobile air conditioners at the standards of operating efficiency and performance prevailing at June 30, 1972.

Competition, or at least the "competitive climate" the antitrust laws of the United States were enacted to protect, cannot survive in the near vacuum created by the acquisition which is the subject of this action. To provide what protection this Court can to the maintenance of a competitive market and to stabilize competition, VWoA and its wholly owned distributors, together with their respective successors and assigns, are, for a period of ten (10) years from the date of divestiture of the VPC assets, enjoined from manufacturing or assembling automobile air conditioners in the United States or any of its territories.

Plaintiff has proposed as part of the relief to be granted herein the further injunction of the importation into the United States of Volkswagen, Porsche or Audi automobiles having air conditioners installed thereon. VWoA has, nearly five months after plaintiff's proposal, raised for the first time the possibility that any restriction upon the importation of Volkswagen automobiles with air conditioners installed therein would be a violation of treaty obligations with the Federal Republic of Germany, particularly Article 16, Section 1 of the German American Treaty of October 29, 1954, as

well as Art. III, Para. 1 and Article I of the General Agreement on Tariffs and Trade (hereinafter referred to as GATT).[4]

Article XVI, Para. 1 of the German/American Treaty signed October 29, 1954 provides:

> "1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."

Article I, Para. 1 of GATT provides:

> "1. With respect to customs duties and charges of any kind imposed on or in connection with

[4]This comes in the form of a memorandum from the German Embassy to the U.S. Department of State which reads:

EXHIBIT A

[Text of Memorandum from German Embassy to U.S. Department of State]

German Embassy
Washington, D.C.
Hi/ag

Note Verbale

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to draw the attention of the Department of State to the following matter:

It has come to the attention of this Embassy that there is presently pending in the U.S. District Court for the Central District of California before Honorable Manuel Real in the case of Calnetics v.. Volkswagen of America, Inc. et al (No. 7o-2185-R), a proceeding which is of concern to citizens and business organizations of the Federal Republic of Germany, as well as the German Government.

The Embassy understands that the court in that case has found Volkswagen of America, Inc., the franchise importer of Volkswagen, Audi and Porsche vehicles, has violated section 7 of the Clayton Act on its acquisition in 1969 of the Delanair Corporation, a company which manufactured air conditioners be installed in VW vehicles as added equipment after importation.

As part of the relief for the violations found by the court, the court is considering to prohibit Volkswagen of America, Inc. for ten years from importing into the United States any

> importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

Volkswagen, Audi or Porsche vehicles with factory installed air conditioning.

The Embassy has, of course, no intention to influence the determination of American courts on matters within their competence and therefore limits comment to the proposal mentioned above.

It objects to this proposal which heavily discriminates against German citizens and German industry and, in its opinion, violates Article 16, Section 1, of the German/American Treaty of October 29, 1954 as well as Article III, Para. 1 and Article I of GATT.

To prevent importation of automobiles with factory-installed air conditioners discriminates both against German manufacturers of the vehicles and also German manufacturers of air conditioners for installation in vehicles. To impose the prohibition under consideration by the court would unfairly apply to these manufacturers sanctions in a dispute in which they were not a party.

The Embassy is informed that the decision to which objection is made will be before the court on November 15, 1972.

The Embassy repeats that it has no desire to interfere in a pending procedure before American courts. It would, however, be grateful if the above-mentioned arguments could be brought to the attention of the appropriate authorities.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the Department of State its assurance of its highest consideration.

Washington, D.C.
November 10, 1972

To the

Department of State

Article III of GATT provides in its pertinent part:

> "1. The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin. . . .
>
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect to all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.
>
> * * *"

The treaty obligations of the United States are given constitutional recognition in Article VI, Clause 2 of the United States Constitution. It provides:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Treaties are thus given Supremacy over the Constitution or laws of any State, but the grant of Article VI is only in parity with the Constitution and Congressional enactments made in the exercise of the legislative power granted in Article I. As such the proscriptions of the Clayton Act Section 7 [15 U.S.C. § 18] are

entitled to construction in *pari materia* to any limitations of the treaties now urged upon the Court by defendants.

No where in the treaties cited to the Court is there any suggestion that either foreign or domestic business entities may engage in practices which are violative of the antitrust laws of the United States. To accept the position of VWoA that in an effort to stabilize the competition in automobile air conditioners for Volkswagen products the Court is prohibited by the cited treaties does not accord with the clear language of these treaties. They deal almost exclusively with *discriminatory* practices concerning the domestic and foreign products of the signatory nations. The Clayton Act, Section 7 [15 U.S.C. § 18] does not—in itself—or as applied by the Court here—discriminate against the products of Germany in favor of United States producers or manufacturers. This judgment is intended to deal with and is aimed at the maintenance of a free, open and competitive market in automobile air conditioners for Volkswagen automobiles. There can be no escape for defendant VWoA in the claim that it is insulated from its violation by any United States treaty with Germany.[5]

Evidence has been presented by VWoA concerning the installation of air conditioning in Volkswagen products at the factory. It is clear that the concern for factory installed air conditioning is of recent vintage prompted largely by this litigation. To permit VWoA to now circumvent the effects of its wrongful conduct

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[5]This Court does not reach the question of the validity of a treaty that would purport to exempt foreign business from the reach of the antitrust laws of the United States. These treaties just do not approach the problem posed in this case.

by changing only "the name of the game" is neither permissible nor desirable. Consequently for a period of seven (7) years from the date of divestiture of the VPC assets, VWoA and its wholly owned distributors, together with their respective successors and assigns, are enjoined from importing into the United States for sale Volkswagen automobiles having air conditioners installed thereon.

Important as it may be, viability of the divested company is only one aspect of a Clayton Act, Section 7, divestiture. The primary purpose of the antitrust laws of the United States is not the survival or demise of a single company but rather the restoration and maintenance of a free competitive environment in which all companies—that can meet the competitive challenge —may have the opportunity to survive. The tool of a judgment—at a single moment in history—is totally inadequate to assure that a divested family member will not become the only supplier to the only real customer of Volkswagen automobile air conditioners. The Court must therefore fashion some flexible standard by which the business needs of a buyer can be compatible with the needs of the various possible suppliers in this market. Reserving to the Court the jurisdiction to amend—upon the presentation of empirical data of the inadequacies of the present limitations—VWoA and its wholly owned distributors, together with their respective successors and assigns, shall be limited to procuring from the purchaser of the divested assets of VPC not more than one-half of their annual requirements of air conditioners. Annual requirements as used herein shall include the total number of air conditioners actually purchased or otherwise acquired by VWoA and its wholly owned distributors, together with their

respective successors and assigns, for resale to their distributors and or dealers for installation in Volkswagen automobiles or for sale as a separate accessory item.

Divestiture shall be made in such manner that no interest, direct or indirect, shall be acquired or maintained by any officer, director, employee or agent of VWoA, nor to any person or entity that beneficially owns or has the power to vote, or controls, or has rights to own or control more than one percent (1%) of the outstanding shares of stock of VWoA. No transfer of assets of VPC shall be made by VPC to any person or entity in which VWoA or its wholly owned distributors, together with their respective successors and assigns, has a financial interest of any kind or nature. VWoA, its wholly-owned distributor, together with their respective successors and assigns, are perpetually enjoined from acquiring or reacquiring control over any of the divested assets.

VWoA shall--upon the negotiation of a sale of the assets herein ordered divested—and within sixty (60) days before the closing date of any sale—report to the Court—in writing and under seal—the name and address of the proposed purchaser, together with all the terms and conditions of the proposed sale. VWoA shall simultaneously advise the Court—in writing and under seal—of all offers—and the terms and conditions of such offers—as may have been made by any person or entity for the purchase of the assets ordered divested herein.

Any contract of sale of the assets ordered divested herein shall provide that the person or entity, together with their successors or assigns, acquiring the divested assets shall not for a period of ten (10) years use

the name Volkswagen in its corporate style or use the Volkswagen logo or trademark as part of its marketing efforts for automobile air conditioners. The contract shall further provide that any person or entity, together with their successors or assigns, acquiring the divested assets shall be bound by the terms of this judgment together with any additions or amendments hereafter made.

As part of the relief sought plaintiff asks payment of its attorneys' fees in successfully prosecuting the Clayton Act, Section 7 aspect of this litigation. The authority for the relief granted plaintiff herein is found in Section 16 of the Clayton Act [15 U.S.C. § 26] which provides in its pertinent part:

> "§ 26. Injunctive relief for private parties; exception.
>
> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief in any court of the United States . . . ."

Nothing in the statutory scheme for injunctive relief expressly provides for the grant of attorneys' fees. But the statutory provision for injunctive relief does provide for the application of general equitable principles to the determination of the relief to be granted when it goes on to say:

> ". . . [U]nder the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

Generally American courts have been in accord that attorneys' fees are not recoverable for the equitable aspects of litigation. *Allen Bradley Co. v. Local No. 13, International Brotherhood of Electrical Workers,*

51 F. Supp. 36 [Sony 1943], rev'd. on other grounds 145 F.2d 215 (2d Cir. 1944); *Talon, Inc. v. Union Slide Fastener, Inc.,* 266 F.2d 731 (9th Cir. 1959); *Gillam v. A. Shyman, Inc.,* 205 F. Supp. 534 (D. Alaska 1962); *Transworld Airlines, Inc. v. Hughes,* 312 F. Supp. 478 [Sony 1970]; *Semke v. Enid Automobile Dealers Association,* 320 F. Supp. 445 (W.D. Okla. 1970); *Milgram v. Loew's, Inc.,* 192 F.2d 579 (3d Cir. 1951); *Decorative Stone Co. v. Building Trades Council of Westchester County,* 23 F.2d 426 (2d Cir. 1928); *Alden-Rochelle, Inc. v. American Society of Composers, Authors & Publishers,* 80 F. Supp. 888 (S.D. N.Y. 1948); *Ring v. Spina,* 84 F. Supp. 403, [Sony 1949] modified *sub nom, Ring v. Authors' League of America, Inc.,* 186 F.2d 637 (2d Cir. 1951) *cert. denied,* 341 U.S. 935 (1951).

More recent considerations by the Supreme Court of the United States of this most difficult problem indicate that the authorities in general accord upon the denial of attorneys' fees for solely equitable relief are subject to exceptions. Some of the exceptions were articulated in *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 19 L.ed.2d 475, 87 S. Ct. 1404 (1967). The principles are summarized when the court says at page 718:

> ". . . They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result."

We must then turn to the nature of the case at hand to determine whether within the broad exception noted in *Fleischmann, supra,* there are "overriding considerations of justice" which should properly permit the assessment of attorneys' fees within the general

equity jurisdiction of this Court recognized in the Clayton Act, Section 16 [15 U.S.C. §26].

No lawyer with any modicum of experience in the trial of antitrust cases can fail to realize that a damage recovery—though conceivable—is highly unlikely in the prosecution of a Clayton, Section 7 [15 U.S.C. § 18] violation. The purpose, if any, in prosecuting such a claim is to obtain for the competitor an environment of a free and unencumbered marketplace. If successful the plaintiff secures not only for itself but for all competitors—actual and prospective—the benefits intended in the enactment of the antitrust laws of the United States. This Court recognized the fallout benefit of plaintiff's suit herein when it said:

> "Equitable relief presents different considerations. A case for divestiture is one in which a single competitor is but one element of the mosaic of competition. Divestiture affects all of the competitors in the marketplace and so all must be considered in the determination of violation vel non. Section 7 of the Clayton Act [15 U.S.C. § 18] was not enacted to equate 'competition' with 'survival' of a single entity but rather to provide the opportunity to freely enter and engage in the marketplace. In this respect there is no 'target' at which to aim the anticompetitive acquisition. Competitors are victims of the fallout of the destruction of competition. A viable plaintiff competing in, or ready to enter into, the marketplace gives the Court the cause for inquiry. *The inquiry is the marketplace and the effects of the claimed anticompetitive acquisition upon the marketplace. For that reason a Section 7 divestiture plaintiff acts somewhat as a Rule 23 class representative and need not satisfy the requirement of 'impact' in its classical antitrust definition.* In a nation that now exceeds one trillion, forty six billion dollars in gross national product, government cannot possibly be relied upon to provide vindication of every person or entity aggrieved by a violation of the antitrust laws. It must be left to private litigants to guarantee to themselves the assurance that the future will not repeat the past. . . ." (Emphasis added) *Calnetics Corporation v. Volkswagen of America, Inc.*, 348 F. Supp. 606, 620 (C.D. Cal. 1972).

Though discussing a statute providing for attorneys' fees in Civil Rights cases, the language of the Supreme Court in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 19 L.Ed.2d 1263, 88 S. Ct. 964, is particularly apt. The Court there says at page 402:

> ". . . When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive power of the federal courts."

Plaintiff herein in the role of "private attorney general" has vindicated a policy of compelling national economic interest—in the prosecution of an action in which this Court has found a violation of the Clayton Act, Section 7 [15 U.S.C. § 18]. The benefit belongs to the marketplace bringing plaintiff's claim for attor-

neys' fees within the principles of *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 83 L.ed. 1184, 59 S. Ct. 777 (1939) and the "overriding considerations of justice" stated in *Fleischmann, supra*. VWoA shall pay to plaintiff the sum of $100,000 as its attorneys' fees in the prosecution of this litigation.

Jurisdiction of this cause is retained by this Court to enable the parties to apply at any time for such further orders or directions as may be necessary or appropriate for the construction or execution of this judgment, for modification of any of the provisions thereof, for the enforcement of compliance therewith and the punishment of violations thereof.

VWoA shall pay to plaintiff its taxable costs herein.

This memorandum opinion and order is the judgment and shall be entered by the Clerk accordingly.

Dated: January 19, 1973.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Calnetics Corporation, and Meier-Line, Inc., *Appellants,* vs. Volkswagen of America, Inc., et al., *Appellees*. No. 73-1954.

Calnetics Corporation, *Appellee,* vs. Volkswagen of America, Inc., *Appellant*. No. 73-1953.

Calnetics Corporation, *Appellee,* vs. Volkswagen of America, Inc., *Appellant*. No. 73-1955.

Calnetics Corporation, *Appellee,* vs. Volkswagen Products Corporation, *Appellant,* No. 73-1956.

Calnetics Corporation, *Appellee,* vs. Volkswagen Products Corporation, *Appellant*. No. 73-1957.

Calnetics Corporation, *Appellee,* vs. Volkswagen Pacific, Inc., *Appellant*. No. 73-1958

[February 24, 1976]

Appeals from the United States District Court for the Central District of California.

Before: BARNES, CHOY, and GOODWIN, Circuit Judges.

PER CURIAM:*

Volkswagen of America, Inc. (VW), and its wholly owned subsidiary, Volkswagen Products Corporation (Subsidiary), defendants in a private antitrust action

*Because of the number and complexity of the issues, all members of the panel participated in the writing of this opinion.

brought by Calnetics Corporation,[1] appeal a district court judgment ordering VW's divestiture of Subsidiary and other equitable relief. VW and Subsidiary also appeal a summary judgment dismissing their counterclaims against Calnetics, and an award of attorneys' fees and costs to Calnetics.

Calnetics cross-appeals from summary judgments and a directed verdict dismissing its claims for damages against VW, Subsidiary, and Volkswagen Pacific, Inc. (Distributor), an independently owned corporation which until 1973[2] distributed VW-imported automobiles and accessories in southern California, southern Nevada, Arizona, and Hawaii.

Distributor appeals from the district court's denial of its motion to amend its answer to add a counterclaim under § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

The summary judgment in favor of Calnetics on each of VW's counterclaims is affirmed, as is the summary judgment in favor of Calnetics on Subsidiary's counterclaim based on the Sherman Act, 15 U.S.C. § 1 *et seq*. All other judgments challenged on appeal

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[1]Meier-Line, Inc., a wholly owned subsidiary of Calnetics Corp., was added to the complaint as an additional plaintiff pursuant to an uncontested motion during the district court's hearing on equitable relief. "Calnetics" in this opinion refers both to Calnetics Corp. and to Meier-Line, Inc. Throughout this opinion, for convenience, all actions taken by Meier-Line will be attributed to Calnetics.

[2]VW and Subsidiary represent in their brief that Distributor abandoned its distribution franchise in 1973 and that VW now sells directly to the dealers in Distributor's former franchise area.

are reversed. The district court's denial of Distributor's motion to add a counterclaim under 15 U.S.C. § 13(c) is also reversed. The district court's award of attorneys' fees and deposition copy costs to Calnetics is set aside. A legend of the parties and claims appears in the margin.[3]

VW, a wholly owned subsidiary of the German automobile manufacturer (Volkswagenwerk A.G.), imports Volkswagen, Porsche, and Audi automobiles into the United States. On September 26, 1969, VW acquired a manufacturer of automobile air conditioning equipment, and changed its name to Volkswagen Products Corporation (Subsidiary). Approximately one year later, Calnetics, an independent manufacturer of automobile air conditioning equipment which previously sold to Distributor, brought suit alleging that VW's acquisition of Subsidiary violated § 7 of the Clayton Act, 15 U.S.C. § 18.

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[3]Chart of the causes of action and dispositions:

Parties:

VW—Volkswagen of America, the wholly owned subsidiary of Volkswagenwerk, A.G.—handles all American deals.

Subsidiary—Volkswagen Products Corp., an air-conditioning manufacturer acquired by VW.

Calnetics—a competing air-conditioning manufacturer that previously sold to Distributor.

Distributor—Volkswagen Pacific, Inc., an independently owned distributor of VW products—the buyer of the air-conditioning units in this case.

Delta—another air-conditioning manufacturer, not a party to these proceedings.

#Meier-Line—a subsidiary of Calnetics (see note 1, *supra*).

(This footnote is continued on next page)

(Footnote 3 continued)

Complainant	Respondent	Cause of Action	Relief Sought	Disposition: District Court	Disposition: 9th Circuit	Location of Discussion in Opinion
1. Calnetics & #Meier-Line	VW, Subsidiary	§ 7, Clayton	Damages	Directed verdict for VW & Subsidiary	Reversed	I. B.
			Equitable relief	Divestiture Import ban Other remedies	Reversed Questioned Questioned	III. C. 1 III. C. 3 III. C.
2. Calnetics	VW, Subsidiary	§§ 1, 2, Sherman	Damages	Sum. judg.* for VW & Subsidiary	Reversed	I. D.
			Equitable relief	Sum. judg.* for VW & Subsidiary	Reversed	I. D.
3. Calnetics	Distributor	§§ 1, 2, Sherman	Both	Sum. Judg. for Distributor	Reversed	I. A.
4. VW, Subsidiary	Calnetics	§§ 1, 2, Sherman § 2(c), Clayton	Both	Sum. judg. for Calnetics	Affirmed**	I. C.
5. Distributor	Calnetics	§ 2(c), Robinson-Patman Pendent claims	Damages?	Denied leave to amend answer so as to assert cause of action	Reversed	V.
6.	.....	.....	.....	Attorney fee for Calnetics	Reversed	IV. A.
7.	.....	.....	.....	Costs for Calnetics	Reversed	IV. B.

*After vacating an earlier denial of summary judgment for VW and Subsidiary.

**Summary judgment for Calnetics on Subsidiary's non-Sherman Act counterclaims was vacated and remanded.

The allegation of a § 7 violation was premised mainly on a theory of vertical restraint[4]—that VW would be able to coerce both its wholly owned and indirectly controlled distributors and dealers to satisfy their demand for automobile air conditioning equipment from Subsidiary's supply, thus foreclosing sales opportunities of Calnetics and other independent air conditioning manufacturers (hereinafter referred to generically as "Delta"). Calnetics also alleged that VW, Distributor, and Subsidiary[5] had conspired and combined to restrain competition in the manufacture, distribution, and sale of air conditioning systems for Volkswagen, Karmann Ghia, and Porsche automobiles in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and had actually monopolized and attempted to monopolize the distribution, manufacture, and sale of air conditioning systems in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

Calnetics sought both damages and equitable relief, including divestiture of Subsidiary. Its claims for damages under the Sherman and Clayton Acts were premised entirely on its exclusion from competition for the sale of automobile air conditioning equipment to Distributor.

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[4]In addition to a traditional theory of vertical restraint, Calnetics also urges that the acquisition diminished competition because: (1) as a subsidiary, Subsidiary enjoyed access to more money and engineering talent than it had as an independent company; (2) as a subsidiary, Subsidiary enjoyed the benefits of engineering coordination with the parent automobile manufacturer; and (3) the acquisition eliminated the acquired firm as a potential competitor.

[5]Calnetics urges that VW and Distributor combined and conspired with Subsidiary's predecessor corporation prior to Sept. 26, 1969, the date of the acquisition, and with Subsidiary thereafter. Throughout the rest of this opinion, "Subsidiary" will refer both to Subsidiary and to the predecessor corporation.

VW and Subsidiary counterclaimed, alleging that a secret agreement between Calnetics and the head of Distributor's service department, R. W. Christiansen, which provided Christiansen and his wholly owned corporation, RWC Sales Corp., with a 3% commission on all sales to Distributor, violated §§ 1 and 2 of the Sherman Act, § 2(c) of the Robinson-Patman Act,[6] and California state law. VW and Subsidiary sought both damages and equitable relief. Distributor filed a counterclaim based on state law, but was not allowed to amend its answer to include a counterclaim under the Robinson-Patman Act.

On February 28, 1972, the trial court granted Distributor's motion for summary judgment on all claims against it,[7] but rejected motions for summary judgment by VW and Subsidiary. The court also granted Calnetics' motion for summary judgment on the counterclaims brought by VW and Subsidiary.

After the February 28 summary judgments, the only claims remaining to be tried were those by Calnetics against VW and Subsidiary under §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act. The district court had earlier ordered that the § 7 claim be tried separately from, and prior to, the Sherman Act claims. Accordingly, a jury trial commenced April 4, 1972, on the § 7 claim.

Upon the conclusion of Calnetics' case in chief, the district court directed a verdict in favor of VW and Subsidiary on the issue of damages, dismissed the jury, and proceeded to hear further evidence on Calnetics' claim for equitable relief.

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[6]15 U.S.C. § 13(c).

[7]Having thus eliminated all federal claims between Distributor and Calnetics, the district court dismissed the pendent state law claims between Distributor and Calnetics.

On June 30, 1972, the district court held that VW's acquisition of Subsidiary violated § 7 of the Clayton Act. *Calnetics Corp. v. Volkswagen of America, Inc.*, 348 F. Supp. 606 (C.D. Cal. 1972). It granted judgment for Calnetics but referred the execution of the relief until the parties had presented "plans for accomplishing the [equitable] relief granted * * *." 348 F. Supp. at 623.

On July 10, 1972, the district court granted summary judgment in favor of VW and Subsidiary on the postponed Sherman Act claims. *Calnetics Corp. v. Volkswagen of America, Inc.*, 348 F. Supp. 623 (C.D. Cal. 1972).

On January 19, 1973, the district court issued a supplemental order which: provided for VW's divestiture of Subsidiary; enjoined VW and its wholly owned subsidiaries for a period of seven years from importing into the United States any Volkswagen, Porsche, or Audi automobiles equipped with factory-installed air conditioning; imposed a 10-year ban on domestic manufacture and assembly of automobile air conditioners by VW; and permanently enjoined VW and its wholly owned distributors from satisfying more than 50% of their need for automobile air conditioners from the output of the divested firm. *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219 (C.D. Cal. 1973).

I. DAMAGE CLAIMS AGAINST VW, SUBSIDIARY, AND DISTRIBUTOR; COUNTERCLAIMS OF VW AND SUBSIDIARY.

VW and Subsidiary argue that all the summary dispositions in their favor and in favor of Distributor are correct. VW and Subsidiary also argue that even

if only one of the three summary dispositions in favor of them or Distributor is correct VW and Subsidiary are necessarily entitled to summary dismissal of all the plaintiff's damage claims. Finally, VW and Subsidiary argue that if all three summary dispositions in favor of them or Distributor are erroneous then Calnetics' entire § 7 claim, which sought both damages and equitable relief, must be remanded for a jury trial. With respect to their counterclaims, VW and Subsidiary urge that the summary judgment in favor of Calnetics was erroneous.

Calnetics argues that the three summary dispositions in favor of Distributor, VW, and Subsidiary were erroneous. It does not respond directly, however, to VW and Subsidiary's argument that the consequence of that error is that VW and Subsidiary become entitled to a jury trial on the entire § 7 claim. (Calnetics implicitly concedes that the defendants can have a jury trial, because Calnetics asserts error in the summary judgments against Calnetics on the damages claims.)

We consider first Calnetics' challenges to the summary dispositions of its damages claims against VW, Subsidiary, and Distributor. In conjunction with our analysis of these challenges, we will also consider VW's and Subsidiary's challenge to the summary judgment dismissing their counterclaims against Calnetics.

A. *Summary Judgment in Favor of Volkswagen Pacific, Inc., (Distributor) on Calnetics' Antitrust Claims.*

Calnetics had alleged that Distributor conspired with VW and Subsidiary (1) unreasonably to restrain trade and commerce in the business of marketing air conditioners for Volkswagen automobiles in violation of §

1 of the Sherman Act, and (2) to monopolize said trade and commerce in violation of § 2 of the Sherman Act. After the submission of numerous documents, depositions, and affidavits, and the presentation of oral and written arguments, the court made extensive findings of fact and concluded that Distributor had not violated the antitrust laws.

The court's critical finding (No. 17) stated:

> "* * * By reason of the problems with and dealer complaints received concerning the * * * [Calnetics] air-conditioners, the refusal of many * * * [Distributor] dealers to purchase those units, and the widespread success of * * * [Delta] in the * * * [Distributor] area, in the fall of 1969 * * * [Distributor] determined, in its *independent business judgment* to cease handling * * * [Calnetics] air-conditioners on an exclusive basis and to distribute the full line of * * * [Delta] air-conditioners. This decision reflected a policy decision by * * * [Distributor] that it was in its interests and those of the dealer and Volkswagen purchaser to have a choice of air-conditioners for each type of automobile." (Emphasis added.)

Although the "independent business judgment" finding seems to have been the basis for the court's summary judgment order on February 28, 1972,[8] the court reconsidered finding No. 17 on May 31, 1972, and replaced it with the following:

> "* * * [T]here is no credible evidence that * * * [Distributor's] ceasing to handle * * *

[8]It is well settled that an independent business decision to cease doing business with a particular supplier or distributor is lawful. *See e.g., Scanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918, 921 (9th Cir.), *cert. denied*, 391 U.S. 916 (1968).

> [Calnetics] air-conditioners on an exclusive basis or at all was the result of any combination or conspiracy by * * * [Distributor] resulting from its *voluntary* act or acts." (Emphasis added.)

Taking into consideration the February 28 findings along with the May 31 amendments, we conclude that the district court's final rationale for the summary judgment order was *not* that Distributor had exercised independent business judgment in ceasing to handle Calnetics' air conditioners, but that the cessation of business was not the result of a combination or conspiracy resulting from any *voluntary* act on the part of Distributor.

In making the May 31 amendment, the court apparently realized that, if the summary judgment in favor of Distributor was based on the independent-business-judgment rationale, it must also grant summary judgment in favor of VW and Subsidiary on the § 7 claim for damages. However, the court did not grant summary judgment in favor of VW or Subsidiary, and, to make its rulings consistent, reconsidered the Distributor findings and amended them so that the Distributor summary judgment would be based on grounds of lack of voluntariness. In doing so, however, the court adopted an erroneous theory. The involuntary nature of one's participation in a conspiracy to monopolize is no defense. An antitrust conspirator can be liable for damages even though he participates only under coercion. *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 375 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); *Otto Milk Co. v. United States Dairy Farmers Cooperative Ass'n*, 261 F. Supp. 381, 385 (W.D. Pa. 1966), *aff'd*, 388 F.2d 789 (3d Cir. 1967).

Although the court in granting summary judgment misapplied substantive law, the judgment should not be reversed if it is correct for some other reason. *See Archer v. United States,* 217 F.2d 548, 551 (9th Cir. 1954), *cert. denied,* 348 U.S. 953 (1955); 6 J. Moore, Federal Practice ¶ 56.27[1], at 2975 (2d ed. 1948, *as amended*, 1975). Thus, we must reach Distributor's argument that summary judgment was correct because Calnetics failed to produce any credible evidence from which a jury could reasonably infer conspiracy in restraint of trade.[9] According to Distributor, the *only* reasonable inference that could be drawn from the undisputed facts was the one the trial judge first drew: that Distributor ceased doing business with Calnetics for purely independent business reasons.

In support of its claim that a genuine issue exists as to Distributor's motivation, Calnetics points to certain undisputed evidence: (1) that in June, 1969, Distributor issued a 10,000-unit purchase order to Calnetics for the 1970 model; (2) that VW acquired Subsidiary on September 26, 1969; (3) that VW urged Distributor to purchase Subsidiary's air conditioners, but at that time Distributor told VW that it was "satisfied" with its present suppliers; (4) that after an October 15, 1969, meeting between VW, Subsidiary, and Distributor executives, Distributor promised that it would join VW's and Subsidiary's marketing efforts; (5) that Subsidiary could not satisfy the total air-conditioning demands of Volkswagen dealers in 1970; (6) that in November, 1969, Distributor placed a 1500-unit order to Calnetics,

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[9]Distributor, in support of its summary judgment motion, never relied on the lack of voluntariness argument, and in its appellate brief chose to ignore the court's May 31 order and rest its case solely on the ground that no genuine issue of material fact exists.

effectively replacing the 10,000-unit purchase order of June; (7) that in early 1970 Distributor notified Calnetics of its intent to cancel the 1500-unit order; (8) that in the beginning of the 1971 model year Subsidiary was "back on the right track"; and (9) that on September 28, 1970, just prior to the 1971 model year, Distributor's service manager wrote to one of its representatives that "[Distributor] is going 100% to Volkswagen Products Corp. [*i.e.*, Subsidiary] air conditioner units for 1971."

Despite Calnetics' arguments to the contrary, the evidence tending to show that Distributor dropped Calnetics as a supplier for purely independent business reasons is substantial and appears strong in comparison with Calnetics' inferences of conspiratorial intent. The dissatisfaction of Distributor and retail dealers with the Calnetics products is well documented, as is Calnetics' rejection of 25% of warranty claims submitted to it, its failure to deliver air conditioners on time, its weak financial condition, and the success of Delta, another manufacturer, in taking business away from Distributor by selling direct to dealers. Further, Calnetics does not dispute the court's finding that Distributor, as a result of the problems it experienced with Calnetics' products, "had no desire to purchase additional * * * [Calnetics] air conditioners * * *." Also tending to show the lack of conspiratorial purpose is the fact that Delta, not Subsidiary, supplied Distributor with the vast majority of the 1970 model-year units which Calnetics claimed it would have supplied but for the conspiracy between VW, Subsidiary, and Distributor.[10]

[10]The extent to which Delta and not Subsidiary replaced Calnetics as a supplier to Distributor is also critical to a determination of damages, if any, suffered by plaintiff. See Part B, *infra*.

If this appeal were from a jury verdict in favor of Distributor, our inquiry would be limited to the presence of evidence sufficient to support the verdict. However, the claim against Distributor was never presented to a jury. It was decided by the court on summary judgment. Our inquiry, therefore, is not whether there is substantial evidence supporting a finding of independent business purpose, but whether no reasonable jury could have found that Distributor participated in a conspiracy to restrain trade. The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact,[11] and, in determining whether the burden has been met, we must draw all inferences of fact against the movant and in favor of the party opposing the motion. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 505 (1969); *DeVoto v. Pacific Fidelity Life Ins. Co.*, 516 F.2d 1, 5 (9th Cir.), *cert. denied*, ... U.S. ..... (1975); *Saxony Products, Inc. v. Guerlain, Inc.*, 513 F.2d 716, 719 n.6 (9th Cir. 1975).

These general standards for the granting of summary judgment become even more strict in the antitrust context. As the Supreme Court observed in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962):

> "* * * We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles,

[11]Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56.

> the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot * * *. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" 368 U.S. at 473.

The key contested issue in the claims against Distributor is motive or intent, and plaintiff should have an opportunity to let the jury draw its own inferences from the undisputed facts unless all reasonable inferences that could be drawn defeat plaintiff's claims. Despite cogent evidence of independent business reasons for Distributor's actions, the fact remains that VW enjoined a special supplier-purchaser relationship with Distributor and that, in the two model years after VW's acquisition of Subsidiary, the Subsidiary air conditioners—considered unfit when they were produced by Subsidiary's predecessor corporation—made substantial inroads into the Distributor market which had been held exclusively by Delta and plaintiff.

Mindful of the Supreme Court's admonition in *Poller v. Columbia Broadcasting System, Inc., supra,* and viewing the evidence as a whole and in a light most favorable to Calnetics, we cannot say that no reasonable jury could have found that Distributor participated in a conspiracy in restraint of trade which resulted in a decision to terminate dealings with plaintiff.[12]

[12]As discussed in Part B, *infra,* another reasonable conspiracy theory that the jury should have an opportunity to consider is that Distributor's initial decision to drop Calnetics was for independent business reasons, but that once Subsidiary was rehabilitated the unlawful foreclosure commenced and Calnetics was prevented by the conspiracy from re-entering the market. If the jury so finds, damages must be calculated from the moment of foreclosure rather than from the date of the acquisition.

Thus, a genuine issue of material fact exists and it is for the jury alone to decide whether Distributor's cessation of business with Calnetics was motivated by independent business reasons or by participation in an illegal conspiracy.[13]

We vacate the summary judgment in favor of Distributor on Calnetics' antitrust claims, and remand the case for trial.

B. *Directed Verdict in Favor of VW and Subsidiary on the Clayton Act § 7 Claim for Damages.*

At the conclusion of Calnetics' case in chief on its claim for damages under § 7 of the Clayton Act, the court granted defendant VW's motion for a directed verdict. The court based its ruling upon its finding that the jury could not reasonably have found a direct and immediate causal connection between VW's acquisition of Subsidiary and Calnetics' alleged damages.

The standard for review of the grant of a directed verdict is identical to that for review of a summary

[13]The fact that the trial court did not grant summary judgment in favor of VW and Subsidiary on Calnetics' § 7 claims tends to indicate that the court also concluded that a genuine issue of fact existed as to the reason for Distributor's dropping of Calnetics as a supplier. In any event, Calnetics' evidence of conspiracy is not so insubstantial as to warrant summary judgment against it.

To void inconsistent results, the district court should bear in mind that the § 7 damage claims and the Sherman Act claims against Distributor, VW, and Subsidiary are all interrelated. Consequently, a jury finding that Distributor made an independent, *long-term* business judgment to cease doing business with plaintiffs would defeat each and every one of plaintiff's damage claims.

judgment order. The appellate court must view the evidence, including all reasonable inferences of fact, in a light most favorable to the party against whom the motion for directed verdict was made. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); 5A J. Moore, Federal Practice ¶50.02 [1], at 2326-27 (2d ed. 1948, *as amended* 1975).

The order for a directed verdict does not clearly indicate the facts upon which the court based its lack-of-causation finding. Conceivably, the court entered its order upon the belief that the evidence conclusively showed that Distributor's termination of business dealings with plaintiffs resulted from the exercise of independent business judgment rather than from participation in a conspiracy. But, as pointed out by VW and Subsidiary, at the time the court ordered a directed verdict, there had been only oblique reference to independent business reasons for Distributor's actions. Therefore, according to VW and Subsidiary, the court must have based its lack-of-causation conclusion on the fact that Calnetics was displaced as Distributor's supplier not by Subsidiary but by Delta. Since we have already concluded that a genuine issue exists. as to Distributor's motivation in terminating its business dealings with Calnetics, the directed verdict in favor of VW and Subsidiary can stand only if no reasonable jury could have found that Subsidiary was responsible for *any* of plaintiff's alleged losses.

In model year 1969, Calnetics sold approximately 4000 units to Distributor, while Delta, selling at that time directly to Volkswagen dealers, sold no units to Distributor. Then, in the fall of 1969, Distributor stated that it would use both Calnetics and Delta as exclusive suppliers for the coming model year. Subsequently, on October 30, 1969, soon after VW's acquisition of Subsidiary, Distributor did order 125 air-conditioner units from Subsidiary. In the months immediately following, additional units were sold by Subsidiary to Distributor, but not in the quantity delivered by Calnetics and Delta. From October 1969 through April 1970, Calnetics supplied 1800 units, Delta 1643, and Subsidiary 460. After April 1970, Subsidiary's sales to Distributor picked up dramatically, and Subsidiary's total sales to Distributor for 1970 amounted to 2024 units. Delta meanwhile sold a total of 4225 units to Distributor in 1970. In contrast to Delta's good sales year, Calnetics sold no additional units to Distributor after April 1970.

In viewing the above evidence, the parties take extreme positions. According to defendants VW and Subsidiary, the evidence proves conclusively that Delta alone displaced Calnetics and, thus, no damages whatsoever resulted from the challenged acquisition; plaintiff Calnetics, on the other hand, boldly claims that but for the acquisition it would have sold Distributor 4800 units in 1970 and another 6500 units in 1971.

Distributor's dissatisfaction with Calnetics' air conditioners and its reliance on Delta as its primary supplier for 1970 provide evidence that Calnetics was not in any way foreclosed from the Distributor market by a conspiracy among VW, Subsidiary, and Distributor. However, viewing all the evidence in a light most favorable to plaintiff, we cannot say that no reasonable jury could have found at least some damages resulting from the acquisition.

In the first place, a jury could have found that some of Subsidiary's sales to Distributor for the 1970 and 1971 model years were made only as a result

of conspiratorial conduct and were made at the expense of Calnetics. Further, even if a jury were to conclude that Subsidiary did not foreclose Calnetics from the Distributor market in the months immediately following the acquisition, we cannot say that no jury could have found an unlawful foreclosure commencing at a later time.[14] The fact, if it is a fact, that the alleged foreclosure here may not have taken effect until after the rehabilitation of Subsidiary or at some other time does not bar a claim for damages for the "postponed" foreclosure. *Cf. United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 597 (1957). Of course, damages must be calculated from the time the foreclosure commenced rather than from the time of acquisition.

As for plaintiff's claim that it would have sold 4800 units to Distributor in 1970 and 6500 in 1971, on retrial plaintiff's recovery, if any, must be limited to damages suffered as a result of sales lost *to the alleged coconspirator-supplier* (Subsidiary). Calnetics alleges that but for the conspiracy it would have sold Distributor about 3000 more units in 1970 than it actually sold. This is obviously wrong, because Subsidiary's total sales to Distributor in 1970 amounted to only 2024 units. Assuming *arguendo* that Calnetics can prove a conspiracy in restraint of trade which resulted in Distributor's purchasing Subsidiary's units, Calnetics nonetheless may not recover from Distributor for sales lost to an, innocent competitor (Delta).[15] The requirement that causation be proved for damages meant

[14] *See* note 12, *supra.*

[15] Delta has not been charged with nor connected in any way with a conspiracy in restraint of trade. Delta has instituted its own antitrust suit against defendants based on an alleged unlawful foreclosure from the air-conditioner market.

that Calnetics may not recover on a calculation of lost sales in a given year exceeding sales made by Subsidiary to Distributor in that same year. Thus, for example, damages in 1970 may not be based on lost sales in excess of 2024 units—the number of units Subsidiary sold to Distributor.

VW and Subsidiary make an alternative argument that, even if causation was proved, and evidence of damages was too unreliable and speculative to allow recovery. Except as to the causation problems discussed *supra,* we believe that a discussion of the adequacy of evidence of damages is premature.[16]

The directed verdict was error. We vacate the judgment based on it, and remand the § 7 claim for a jury trial.

C. *Summary Judgments in Favor of Calnetics on VW's and Subsidiary's Counterclaims.*

The defendants' counterclaims had all been predicated on the commission arrangement between Christiansen (Distributor's service manager) and Calnetics. In entering summary judgment in favor of Calnetics, the court found:

> "* * * That the decision by defendant Volkswagen Pacific, Inc. [the Distributor] to discontinue the promotion of the * * * [Subsidiary] air-conditioning systems was not causally related in any way to the entering into a sales commission agreement between plaintiff and * * * [Christiansen]."

[16] Plaintiffs may base damages figures on 1969 model-year sales, even assuming *arguendo* that they were "illegal" sales. *See* Part I. D., *infra.*

As was the case with Distributor's decision to drop Calnetics as a supplier in 1970,[17] the facts surrounding the decision to drop Subsidiary in 1968 are complex and subject to various interpretations. The district court itself was apparently confused by the contradictory claims and conflicting evidence of the opposing parties. It was led into making two totally inconsistent findings as to the causal relationship between the agreement and Calnetics' sales. The counterclaim finding quoted above cannot be reconciled with finding No. 31, entered on August 1, 1972, when the court dismissed Calnetics' Sherman Act claims:[18]

> "* * * As a direct and proximate consequence of the agreement between Christiansen and plaintiff and the payments made to Christiansen in accordance with its terms, competitive suppliers of air conditioners for Volkswagen automobiles, including [VW], were excluded during the 1969 model year from selling air conditioners."

Considering the trial court's own difficulty with this important factual dispute and viewing the evidence in a light most favorable to the parties opposing the summary judgment (VW and Subsidiary), we conclude that a genuine issue as to causation exists.

It is undisputed that Christiansen, who was Distributor's service manager from 1967 to November 1969, entered into a written agreement in the fall of 1968 providing *inter alia* that his newly-formed company, RWC Sales Corporation, would receive a three percent commission on all sales of Calnetics' units to Distributor. However, the exact sequence of events in the

[17] *See* Part I. A., *supra*.

[18] *See* Part I. D., *infra*.

summer and fall of 1968 and the effect of the commission agreement are not so clearly established in the documents on file that a jury trial is unnecessary. Although credible evidence suggests that the agreement was not consummated until fall, 1968, and not until *after* the Calnetics order was placed by Distributor, the evidence is far from conclusive. Christiansen and a Calnetics executive did in fact meet during the summer of 1968, and a reasonable inference, considering the signing of the actual agreement just a few months later, is that the commission agreement was hammered out during the summer.[19]

Further, a genuine fact issue exists as to the date on which Distributor made its decision to order Calnetics' units for the 1969 model year. If that decision was made prior to the consummation of the Christiansen agreement, a causal gap exists in defendants' facts. However, a jury might infer that the commission agreement and Distributor's decision to purchase Calnetics' products ripened together. And, even if initial 1969 orders were made prior to the Christiansen agreement, a jury might find that Calnetics maintained its position in the volatile air-conditioner market to Subsidiary's detriment because of the commission agreement.

Subsidiary's units, like those of the competing brands, were not completely satisfactory to Distributor, and distributor may have dropped Subsidiary for purely independent business reasons. However, it is for the jury in a plenary trial, not the judge in a summary proceeding, to determine Distributor's motivation and the sequence of events leading up to Distributor's decision. For this reason, the counterclaim should not have

[19] *See* finding No. 14, 348 F. Supp. at 625.

been dismissed in its entirety. However, another ground does exist which compels partial dismissal.

An issue that may be renewed upon trial was raised by the summary judgment order against VW and Subsidiary. The court held that defendants' first counterclaim failed to state a claim for relief under §§ 1 and 2 of the Sherman Act. We agree. VW's and Subsidiary's claim of commercial bribery, standing alone, does not constitute a violation of the Sherman Act.[20] *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393, 400 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); *cf. United States v. Boston & Maine R.R.*, 380 U.S. 157, 162 (1965); *Norville v. Globe Oil & Refining Co.*, 303 F.2d 281, 282-83 (7th Cir. 1962). As the district court stated in *Sterling Nelson:*

> "The evidence here proves only bribery of an influential state employee which had a detrimental restraining effect upon interstate commerce. This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act * * *. [T]he Sherman Act must be interpreted in the light of well understood common law doctrines relating to monopolies and restraints of trade such as contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production

[20]This case does not present the question nor do we here decide under what circumstances a claim of commercial bribery tied to claims of other acts tending to restrain trade would state a cause of action under §§ 1 and 2 of the Sherman Act.

> and the like. Nothing of that kind occurred here. This is a simple case of buying influence, sometimes called commercial bribery * * *." 235 F. Supp. at 400.

VW's and Subsidiary reliance on the Ninth Circuit opinion in *Sterling Nelson* for the proposition that antitrust claims may be based on commercial bribery is misplaced. This court decided merely that, according to congressional intent,[21] a claim under § *2(c) of the Clayton Act* could be based on commercial bribery. 351 F.2d at 858. The district court holding in *Sterling Nelson* that Sherman Act claims may not be predicated on commercial bribery was never presented to the Ninth Circuit for review, plaintiffs there having failed to cross-appeal from the dismissal of their Sherman Act claims.

The district court also based its summary dismissal of VW's counterclaims on the alternative ground that VW could not establish any damages flowing from the alleged Christiansen-Distributor commission agreement. That ruling is amply supported by the unequivocal testimony of VW's president, J. Stuart Perkins, that VW's expenses in distributing Subsidiary units would "eat up" any anticipated profit resulting from buying the units at one price and reselling them at a higher price. Because this testimony is undisputed and credible, and because VW has failed to point to any evidence tending to show that a genuine issue exists as to VW's damages, we affirm the summary judgment as to VW's counterclaims. However, a genuine issue of material fact remains as to the amount, if any, of Subsidiary's damages.

[21]*See FTC v. Henry Broch & Co.*, 363 U.S. 166, 169-70 n.6 (1960), *citing* 80 Cong. Rec. 7759-60, 8111-12.

The summary judgment in favor of Calnetics on each of VW's counterclaims is affirmed for lack of proof of injury to VW. The summary judgment in favor of Calnetics on Subsidiary's counterclaim based on the Sherman Act is affirmed, but the summary judgment in favor of Calnetics on Subsidiary's other counterclaims is vacated and those claims are remanded for trial.

D. *Summary Judgment in Favor of VW and Subsidiary on the Sherman Act Claims.*

The district court granted summary judgment against Calnetics on its Sherman Act claims because Calnetics had entered into an illegal commission agreement with Christiansen which resulted in sales by Calnetics to Distributor in 1969. The court held that these sales were inadmissible for the purpose of proving damages. Without the use of the 1969 sales figures, Calnetics was unable to frame a damages study to show anticipated sales for 1970 and 1971.

The district court committed both a factual and a legal error in granting this partial summary judgment. As noted, a genuine issue of material fact exists as to the cause-and-effect relationship between the Christiansen commission agreement and Calnetics' sales to Distributor during the 1969 model year.[22] More important, the district court erred in ruling that because the 1969 sales resulted from an unlawful agreement they could not be admitted in evidence as a basis for calculating Calnetics' damages. Admissibility is one thing: weight and probative value another. The evidence may be weakened as to its value, but it is not categorically inadmissible.

[22]Defendants themselves concede that a genuine issue of fact exists as to causation. In arguing that the district court erred in entering summary judgment against them on their counterclaims, VW and Subsidiary note in their briefs that "[o]nly a jury can decide the relationship in time between Christiansen's expectation of a share in plaintiff's revenues from sales to * * * [Distributor] and * * * [Distributor's] decision to distribute plaintiff's units."

Further, the court's inconsistent causation findings in the summary judgment order in favor of VW and Subsidiary on the Sherman Act claims and in the summary judgment order in favor of Calnetics on the counterclaims suggests that the complexity of the evidence precludes use of summary procedures.

Defendants' challenge to Calnetics' reliance on the 1969 sales figures is in effect an *in pari delicto* or "unclean hands" defense, which is not a defense in an action for treble damages. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

The Perma Life rule is firmly based on public policy grounds. As the Supreme Court stated:

> " * * * [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his

position since they remain fully subject to civil and criminal penalties for their own illegal conduct." 392 U.S. at 139.

Contending that their defense is not one of *in pari delicto* or unclean hands, and is thus not barred by *Perma Life*, defendants argue that they are not challenging Calnetics' *right* to bring an antitrust action but merely its reliance on *illegal* sales for proof of damages. *See* E. Timberlake, Federal Treble Damage Antitrust Action § 21.10, at 326-28 (1965).[23] Labels, however, are not controlling,[24] and we find no legitimate reason for distinguishing defendants' "illegal sales" argument from the *in pari delicto* type of defense struck down in *Perma Life*.

From a practical point of view, Calnetics is in a position no different from that of the plaintiff in *Purex Corp. v. General Foods Corp.*, 318 F. Supp. 322 (C.D. Cal. 1970), who had acquired an antitrust cause of action by virtue of an acquisition which was itself illegal. Recognizing the asserted defense of illegality

[23]As stated by Timberlake:

> "This [refusal to consider ill-gotten gains as a basis of damages] is not a pari delicto defense, nor is it a defense that plaintiff was otherwise violating the antitrust laws * * *. It is simply that profits made in the 'before' period, when plaintiff was the beneficiary of the unlawful acts, are not proper evidence upon which to predicate lost profits in the 'after' period." E. Timberlake, Federal Treble Damage Antitrust Action § 21.10, at 326.

However, Timberlake's argument should be read in light of the fact that his treatise was written three years before the Supreme Court's opinion in *Perma Life*. Further, *Victor Talking Machine Co. v. Kemeny*, 271 F. 810, 819 (3d Cir. 1921), upon which Timberlake primarily relies, was decided long before the trend against the use of the *in pari delicto* defense in antitrust suits took hold.

[24]*See Waldron v. British Petroleum Co., Ltd.*, 231 F. Supp. 72, 90-92 (S.D.N.Y. 1964).

as a species of *in pari delicto*, the *Purex* court rejected it. VW's and Subsidiary's defense is also strikingly similar to that rejected by the Tenth Circuit in *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972). In *Semke*, the plaintiff, an unlicensed dealer in new cars, brought suit against an automobile dealers' association for its interference with his business efforts. Citing *Perma Life*, the court refused to let defendant argue that plaintiff's whole business operation was illegal because he was in violation of state licensing statutes designed to protect the public from unscrupulous automobile dealers. The plaintiff, the court found, was entitled to prove damages his business suffered, even though at the time of injury plaintiff may have been illegally engaged in the automobile retail business 456 F.2d at 1370. *See also Adolf Coors Co. v. A & S Wholesalers, Inc.*, 1975-1 CCH Trade Cases ¶ 60,187, at 65,626, 65,631 (D. Colo. 1975).

Similarly, if Calnetics proves that defendants unlawfully foreclosed it from the Distributor market in 1970 and 1971, it is entitled to recover damages actually suffered even though the market position from which Calnetics was displaced had been attained only through illegal conduct. To rule otherwise would effectively frustrate the important public policy underlining the antitrust laws: encouragement of private antitrust suits in order to deter the illegal exercise of market power. *See Lanier Business Products v. Graymar Co.*, 355 F. Supp. 524, 526 (D. Md. 1973). By allowing Calnetics to base its proof of damages on its 1969 sales, even assuming *arguendo* their illegality, we are not giving a green light to companies to violate the law against commercial bribery. As stated in *Perma Life*, antitrust violators "remain fully subject to civil and

criminal penalties for their own illegal conduct." 392 U.S. at 139. The fact that Calnetics is itself not immune from liability is underlined by Subsidiary's counterclaim for damages which, if sustained, will force Calnetics to disgorge any gains shown to be ill-gotten.

The summary judgments in favor of VW and Subsidiary on the Sherman Act claims are vacated.

II. EFFECT OF REVERSAL OF SUMMARY DISPOSITIONS IN FAVOR OF VW, SUBSIDIARY, AND DISTRIBUTOR ON THE CLAYTON ACT JUDGMENT AWARDING EQUITABLE RELIEF.

In its complaint, Calnetics demanded a jury trial. VW, Subsidiary, and Distributor were entitled to rely on this demand, and were not obliged to make an independent demand with respect to the issues covered by Calnetics' demand in order to preserve their right to trial by jury under Fed. R. Civ. P. 38. *See* 5 J. Moore, Federal Practice ¶ 38.39[1], at 312; ¶ 38.45 (2d ed. 1948, *as amended* 1975).

Trial by jury of Calnetics' § 7 claim commenced on April 4, 1972, but was interrupted by a directed verdict on the issue of damages at the close of Calnetics' case. After granting the directed verdict the court dismissed the jury, over objections by VW and Subsidiary. The court then heard evidence on the remaining equitable claims, held that the acquisition of Subsidiary violated § 7 of the Clayton Act, and ordered divestiture.

Calnetics does not directly argue with VW's and Subsidiary's contention that, if the directed verdict and other summary dispositions in favor of VW and Subsidiary were erroneous, the defendants are entitled to a jury trial on remand of the entire § 7 claim, but a new trial makes it necessary to decide this point.

The Supreme Court held in *Ross v. Bernhard,* 396 U.S. 531 (1970), that "where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to equitable ones or by a court trial of a common issue existing between the claims * * *." 396 U.S. at 537-38. Prior nonjury trial of the equitable claims may infringe the right to jury trial on the legal claims because of the collateral estoppel or *res judicata* effect of a prior judicial determination of issues common to the two sets of claims. *Heyman v. Kline,* 456 F.2d 123, 130 (2d Cir.), *cert. denied,* 409 U.S. 847 (1972).

VW and Subsidiary are entitled to a jury determination of the Clayton Act claim for damages; this right may not be infringed by a prior judicial determination of the equitable claim. If the district court's determination that the acquisition violated § 7, made in the context of a nonjury trial of the equitable claims, were allowed to stand it would bind VW and Subsidiary in subsequent proceedings. Because the damages claim under § 7 remains outstanding as the result of our reversal of the § 7 directed verdict, the prior determination of a § 7 violation would infringe VW's and Subsidiary's right to a jury trial of the damages claim. Accordingly, the district court's judgment holding that the acquisition violated § 7 must be vacated.[25]

[25]Calnetics did not offer to waive the collateral estoppel effect of the § 7 equitable determination on remand. But even if it had, we would be inclined to remand for a consolidated trial because of the threat of inconsistent determinations. *See Heyman v. Kline,* 456 F.2d 123, 131 (2d Cir.), *cert. denied,* 409 U.S. 847 (1972).

The entire § 7 claim must be remanded for a jury trial. If, on remand, the jury determines that the acquisition did not violate § 7, that determination will preclude equitable relief.[26] If the jury determines that the acquisition did violate § 7, the trial judge must then go on to decide whether Calnetics is entitled to equitable relief under the standards of § 16 of the Clayton Act, 15 U.S.C. § 26.

III. VW'S AND SUBSIDIARY'S ARGUMENTS ON THE MERITS OF THE § 7 HOLDING AND RELIEF.

Our resolution of the jury-trial issue makes it unnecessary to deal either with VW's and Subsidiary's challenges to the merits of the district court's holding that the acquisition violated § 7 of the Clayton Act or with their challenges to the equitable relief granted by the district court. Nevertheless, in the interest of judicial economy, it is appropriate to comment briefly on challenged rulings that are likely to recur. On the other hand, our failure to discuss other issues raised by VW and Subsidiary does not indicate approval or disapproval of rulings made below.

A. *Definition of Product Market.*

In defining the product market, the district court explicitly refused to consider the cross-elasticity of production facilities or capacity. *Calnetics Corp. v. Volkswagen of America, Inc.*, 348 F. Supp. at 618. VW and Subsidiary argue that this refusal rendered the

[26]This is so because Calnetics' request for equitable relief, as well as its claim for damages, is based on the theory that the acquisition constituted a violation of § 7. Accordingly, the jury's resolution of the violation issue will control both sets of claims.

ensuing market definition—"air conditioners sold for use in the Volkswagen family of automobiles," clearly erroneous because not reflective of the sales opportunities of independent manufacturers of automobile air-conditioning equipment. VW and Subsidiary urge that such manufacturers may with little modification of production facilities produce units for different makes of cars.

The district court's failure to consider production cross-elasticity was inconsistent with the views of the Supreme Court[27] and of this circuit.[28] This is not to say that production cross-elasticity is the only factor which can be considered by the trier of fact in defining the product market.[29]

B. *Effect of the Acquisition.*

VW and Subsidiary argue that the trial court erred by relying exclusively on postacquisition changes in market shares in assessing the legality of the merger while omitting any economic analysis of its anticompetitive effect. Without accepting VW and Subsidiary's characterization of the district court's method, we agree that a more careful analysis was required.

The primary, though not exclusive, theory of Calnetics' § 7 attack on VW's acquisition of Subsidiary was vertical foreclosure. Foreclosure was threatened, Calnetics argued, not because VW itself was likely to satisfy its own demand from the output of the

[27]*See Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 n.42 (1962); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11, 527 (1948).

[28]*Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1274 (9th Cir. 1975).

[29]*See, e.g., Heatransfer Corp. v. Volkswagenwerk, A.G.*, 1975-I CCH Trade Cases ¶ 60,309 at 66,216, 66,219 (S.D. Texas 1975).

acquired firm but because VW's dealers and distributors were likely to satisfy their demand from such supply.

A threat of unlawful vertical foreclosure may exist when there is a vertical tie—such as common ownership of a customer and a supplier—for such a tie creates a danger that the normal competitive forces in the marketplace will be displaced.[30] In a vertical merger the danger is that control over both a customer and a supplier will permit the controlling party to coerce the purchasing or selling policies of the captive firm, resulting in a "'clog on competition' * * * [citation omitted]," *Brown Shoe Co. v. United States,* 370 U.S. 294, 324 (1962), or a "commanding position [for the controlling party] * * * not gained solely on competitive merit." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 605 (1957).

With respect to VW's wholly owned distributors, the existence of a vertical tie running from Subsidiary through VW to the distributors is clear enough. But it is not clear that VW control over the purchasing decisions of those distributors in which VW does not own a controlling interest can be properly inferred on the basis of the present record. The existence of the requisite control by VW over the purchasing decisions of Volkswagen dealers is even more doubtful in light of the district court's finding that "dealers [who buy air-conditioners from Distributor] are now, and always have been, free to purchase any type air-conditioner they desire from any source they desire."

We are confident that, on remand, the district court will properly instruct the jury on issues relating to vertical foreclosure.

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[30] *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 323-24 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-28 (1947).

C. *Equitable Relief.*

In the event Calnetics obtains a jury verdict on its antitrust claims against VW and Subsidiary, the district court will be required to evaluate Calnetics' right to equitable relief and, if the court deems relief appropriate, fashion a suitable decree.

In order to provide the district court with guidance in the event equitable issues arise, we turn to contentions made by VW and Subsidiary with respect to the equitable relief ordered by the district court in its supplemental order of January 19, 1973. *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219 (C.D. Cal. 1973).

1. *Divestiture.*

The district court ordered the divestiture of Subsidiary. Under the law of this circuit, the remedy of divestiture is not available to private plaintiffs in antitrust suits. *International Telephone and Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975).

2. *Threat of Loss or Damages Precondition to Equitable Relief Under § 16.*

The district court held that, while Calnetics had not proved a causal connection between its loss of the Distributor market and the challenged merger, it was nonetheless entitled to equitable relief under § 16 of the Clayton Act because "a Section 7 *divestiture* plaintiff acts somewhat as a Rule 23 class representative and need not satisfy the requirement of 'impact' in its classical antitrust definition." *Calnetics Corp. v. Volkswagen of America, Inc.*, 348 F. Supp. at 620. (Emphasis added.) The court further stated that the proper focus was not on prospective injury to the

particular plaintiff but rather on the "marketplace and the effects of the claimed anticompetitive acquisition upon the marketplace."

Because the remedy of divestiture is not available, the correctness of the district court's view that a private divestiture plaintiff need not satisfy the traditional requirement of "impact" is moot. The general rule, as stated by *United States v. Borden Co.*, 347 U.S. 514, 518 (1954), controls: "Under § 16 * * * a private plaintiff may obtain injunctive relief against * * * violations only on a showing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff * * * [citation omitted]."

In evaluating the plaintiff's entitlement to relief under § 16, the proper focus is on the threat of prospective injury to Calnetics. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).[31]

3. *The Import Ban.*

The district court enjoined VW and its wholly owned distributors for a period of seven years from importing any Volkswagens, Porsches, or Audis equipped with air conditioning installed prior to importation.

VW and Subsidiary (as well as the Federal Republic of Germany) urge that this import ban offends Article 16 of the German/American Treaty of 1954,[32] and Articles I and III of the General Agreement on Tariffs and Trade (GATT),[33] because it restricts German

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[31]*See also Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61-62 (1975).

[32]U.S.T. 1839, 1857, T.I.A.S. No. 3593 (1956). The United States as amicus takes the view that the import ban does not offend the treaty or GATT.

[33]61 Stat. Pt. 5, at A-5, A-12 through A-13, A-18 through A-19; T.I.A.S. No. 1700, 55-61 U.N.T.S. (1947).

manufacturers but not American automobile manufacturers, who remain free to sell cars with factory-installed air conditioners.

The district court was apparently of the view that the treaties had no application, *see Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. at 1222 n.5, because the relief granted did not "discriminate against the products of Germany in favor of United States products or manufacturers." Rather, the relief granted was merely "intended to deal with and is aimed at the maintenance of a free, open and competitive market in automobile air conditioners for Volkswagen automobiles." 353 F. Supp. at 1222.

The district court apparently considered only the effect of its decree on competition within the submarket it had defined; on that basis, the decree did not "discriminate" against a German manufacturer, because the import ban was merely one of a series of restrictions aimed at controlling the purchasing and manufacturing activities of a domestic corporation, Volkswagen of America.

This reasoning is based upon an unduly limited market concept. The import ban affects not only competition for the sale of domestic automobile air conditioners but also competition for the sale of automobiles. The record demonstrates that an important factor in the sale of automobiles is the availability of integrated, factory-installed air conditioning. The ban discriminates against the German automobile manufacturer because it forbids him to sell in the United States cars with factory-installed air conditioning while imposing no similar restriction on domestic automobile manufacturers.

An exception in GATT does permit restrictive measures "necessary" to comply with United States antitrust

laws.[34] But because the district court did not consider the treaties relevant, it did not attempt to justify the import ban under this exception.

Apart from treaty provisions, the effect of the import ban would be anticompetitive with respect to competition for the sale of automobiles. While courts must disregard such incidental effects in determining the illegality *vel non* of an alleged antitrust violation,[35] they should consider them when fashioning relief.[36]

Similarly, the ban will have at least a short-term anticompetitive effect with respect to competition for the sale of air conditioning equipment, because Volkswagenwerk A.G., the German manufacturer, will vanish as a potential market entrant, thus eliminating any downward price pressure the threat of its entry into the market might exert.

If, on remand, there is a jury verdict in favor of Calnetics on one or more of its antitrust claims against VW and Subsidiary, and if the district court makes the further determination that Calnetics is entitled to equitable relief under the traditional standards governing the availability of relief under § 16 of the Clayton Act, then the court should reassess the necessity for an import ban in light of (1) the applicability of the treaties, (2) the unavailability of the divestiture remedy, (3) the anticompetitive effect of the ban with respect to competition for the sale of automobiles, and (4) the anticompetitive effect of the ban with

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[34]Article XX(I)(d) of GATT, 61 Stat. Pt. 5, at A-61.

[35]*Cf., United States v. Philadelphia National Bank,* 374 U.S. 321, 370-71 (1963).

[36]The relief granted must, of course, be effective to redress the violation and restore competition. *United States v. E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 326 (1961).

respect to competition for the sale of automobile air conditioners.

A special word is in order insofar as the district court may, on remand, contemplate reimposition of a ban on importation by VW of Porsche automobiles equipped with factory-installed air conditioning. Porsche was not a party to the proceedings below. It is an independent German corporation unrelated by ownership to any party in these proceedings. Its only connection to VW is that VW imports the Porsche product —a luxury sports car—into the United States. Elementary fairness requires that Porsche be given a chance to be heard before its importation agreement with VW is, in effect, partially voided by judicial decree.

4. *The Ban on Internal Expansion.*

VW and Subsidiary urge that the 10-year ban on domestic manufacture and assembly of automobile air conditioners which the district court placed on VW was unsupported by any factual conclusions or analysis.

Calnetics does not directly counter this argument in its responsive brief and reply.

The district court stated that the ban was necessary in light of the "near vacuum [of demand, presumably] created by the acquisition * * *." The ban was further justified as assisting in "the maintenance of a competitive market" and "stabiliz[ing] competition * * *" in the aftermath of divestiture. 353 F. Supp. at 1221.

The ban on internal expansion was intended as a supplement to divestiture relief—presumably aimed at "maintaining the divested company as a viable competitor in the marketplace without the aid of the protective practices of a parent who is its sole customer."

353 F. Supp. at 1221. Because divestiture is not an available remedy, there is scant basis for imposition of a ban on internal expansion on remand. The district court should, if the issue arises, reconsider the advisability of a ban on internal expansion in light of alternative injunctive remedies and the unavailability of divestiture.

5. *The Perpetual Purchase Restriction.*

The district court permanently enjoined VW and its wholly owned distributors from satisfying more than 50% of their air-conditioning equipment needs from the output of the divested firm. While the propriety of this particular quota is moot because of the unavailability of divestiture, we deal with the arguments relating to the 50% quota in order to guide the district court should it consider imposing a similar permanent quota on remand.

The United States virtually concedes in its *amicus* brief that the perpetual purchase restriction was error. Calnetics seeks to defend the restriction as necessary to insure that VW will not continue to buy all of its requirements from the purchaser of the divested firm. Calnetics argues that the 50% quota creates an open market for the competitors of the divested firm.

The 50% quota, however, creates the antithesis of an open market. As the district court inadvertently acknowledged, the effect of the quota is to displace the competitive forces of the marketplace and transform a segment of the automobile air-conditioning equipment business into a regulated industry. *See* 353 F. Supp. at 1223. ("The Court must therefore fashion some flexible standard by which the business needs of a buyer can be compatible with the needs of the various

suppliers in the market.") It is inconceivable that such a quota would serve the goals of the antitrust laws, which are designed to preserve competition, not particular competitors.[37]

IV. ATTORNEYS' FEES AND COSTS.

A. *Attorneys' Fees.*

The district court awarded Calnetics attorneys' fees because it had acted "in the role of 'private attorney general' * * *." 353 F. Supp. at 1225. Such an award is now precluded by *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

B. *Costs.*

VW and Subsidiary argue that the district court erred in awarding the plaintiff $5,955.92 in costs for counsel's copies of depositions in contravention of a local rule of the district court which provided, with respect to deposition costs, that "[c]ounsel's copies are not taxable." Calnetics urges that the local rule was merely for the guidance of the Clerk of the Court and did not abrogate the district judge's inherent discretion. Calnetics' argument is foreclosed by *Rio Grande Irrigation and Colonization Co. v. Gildersleeve*, 174 U.S. 603, 608-09 (1899) ("'A rule of the court thus authorized and made has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case * * *' * * *," *quoting Thompson v. Hatch*, 3 Pick. 512, 515 (20 Mass., Jan. 13, 1827); *accord, Weil v. Neary*, 278 U.S. U.S. 160, 169 (1929)).

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[37] *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Calnetics relies on *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 678 (9th Cir. 1963), which held that a "trial judge [has] the power to tax the expense of * * * depositions * * * [because] such power is 'implicit in 28 U.S.C. § 1920(2)' * * *." *Independent Iron Works* is inapposite because the cost award there did not contravene a local rule.

The award of costs for counsel's copies of depositions was error.

V. DISTRIBUTOR'S PROPOSED COUNTERCLAIM UNDER 15 U.S.C. § 13(c).

Distributor appeals from an order of the district court denying in part a motion to amend its answer. Distributor sought to add three counterclaims. The first counterclaim was against Calnetics for breach of warranty. The second and third counterclaims were brought against Calnetics, certain officers and directors of Calnetics, and certain employees of Distributor. (Both the second and third counterclaims involve identical parties.) Additionally, both the second and third counterclaims are based on the same allegations of fact: that Calnetics paid substantial sums of money to certain Distributor employees to induce them to use their positions to see to it that Distributor purchased all, or substantially all, of its air-conditioner requirements from Calnetics.

The second and third counterclaims differ as to the nature of the damages caused, the remedy sought,

and the theory of liability. The second counterclaim alleges commercial bribery in violation of § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). The second counterclaim alleges that this commercial bribery caused Distributor to continue to deal with plaintiff despite the inferior nature of plaintiff's product, and that this caused Distributor to suffer damages in excess of $150,000, in lost sales due to customer dissatisfaction, damages to its good will and reputation, and costs in having to repair and remedy the defective products. The third counterclaim is based on state statutory prohibitions against inducing the breach of a fiduciary relationship. The third counterclaim seeks to recover the secret profits (*i.e.*, the bribes) paid to Distributor's employees, and exemplary damages.

The district court granted Distributor's motion to amend in part, allowing the addition of the first and third counterclaims, but denying the addition of the second. The district court's order does not explain its reasons for refusing to allow the addition of the second counterclaim.

Calnetics suggests several procedural reasons: the proposed amendment was tardy, would have caused undue confusion of the issues, would have caused undue delay. But these hindsight rationalizations are not convincing in light of the district court's granting the motion to add two other counterclaims by Distributor, one of which (the third) would have posed the identical procedural problems.

We suspect that Calnetics approaches the district court's actual reason for denying Distributor's motion to add the second counterclaim when it argues in its brief:

> "As the District Court pointed out to * * * [Distributor's] counsel at the hearing on the motion for leave to amend, the proposed second count (Robinson-Patman claims) failed to state a claim for recoverable damages. In its antitrust claim, * * * [Distributor] did not assert the kind of injury which has been recognized and for which damages have been recovered in 'commercial bribery' cases under Section 2(c) of the Robinson-Patman Act. * * * [Distributor] did not claim that it had been overcharged and paid excessive prices for plaintiff's products by reason of the alleged secret payments, as was the case in *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943) * * * . And * * * [Distributor] did not and, of course, could not claim that it was precluded by a competitor from the market (in this case, itself) because of commercial bribery, as was the case in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965) [*cert. denied*, 383 U.S. 936 (1966)]."

If this is in fact the reason why the district court refused to allow the amendment (and we think it is), we believe that both the court below and Calnetics have taken too narrow a reading of the *Rangen* and *Fitch* cases as to the relief available under § 2(c).

Both *Fitch*, 136 F.2d at 15, and *Rangen*, 351 F.2d at 856-58, have held that § 2(c)'s application is not

limited to situations of price discrimination, but also encompasses commercial bribery. In *Rangen* this court held:

> "With regard to the legislative history, defendants cite excerpts which amply demonstrate that, in enacting section 2(c), the prime concern of Congress was to curtail price discriminations accomplished by pseudo-brokerage arrangements. The Supreme Court, in Federal Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 169, 88 S. Ct. 1158, 4 L.Ed.2d 1124, noted this principal legislative concern. But, in a footnote (page 169), the Court also expressed the view that the legislative history demonstrates a Congressional intent to proscribe other practices such as the bribing of a seller's broker by the buyer * * * [footnote omitted].
>
> "This view is further borne out by the statement in the House Report, quoted below, indicating that Congress was concerned with preserving the fiduciary relationship between a broker and his client * * * [footnote omitted].
>
> " * * *
>
> " * * * In our case the bribery not only undermined a fiduciary relationship which Congress sought to protect, but gave one seller a grossly unfair advantage over a competing seller. Where commercial bribery is associated with evils which a particular provision of the antitrust laws was designed to prevent, the fact that it was bribery rather than a more defensible arrangement ought not to preclude application of the statute." 351 F.2d at 856-57.

The alleged violations in the instant case no less involve the undermining of fiduciary relationships than did those in *Fitch* or *Rangen*. We hold that, if Distributor is able on remand to prove that counterdefendants indeed committed acts of commercial bribery in violation of § 2(c), then the defendants ought to be allowed any damages proximately caused by that violation.

The district court erred in denying Distributor's motion to amend its answer to add the second counterclaim.

VI. CONCLUSION.

The claims and counterclaims discussed above are remanded for further proceedings consistent with the views expressed herein.

APPENDIX D.

Order.

United States Court of Appeals, for the Ninth Circuit.

Calnetics Corporation, and Meier-Line, Inc., Appellants, v. Volkswagen of America, Inc., et al., Appellees. No. 73-1954.

Calnetics Corporation, Appellee, v. Volkswagen of America, Inc., Appellant. No. 73-1953.

Calnetics Corporation, Appellee, v. Volkswagen of America, Inc., Appellant. No. 73-1955.

Calnetics Corporation, Appellee, v. Volkswagen Products Corporation, Appellant. No. 73-1956.

Calnetics Corporation, Appellee, v. Volkswagen Products Corporation, Appellant. No. 73-1957.

Calnetics Corporation, Appellee, v. Volkswagen Pacific, Inc., Appellant. No. 73-1958.

Appeals from the United States District Court for the Central District of California.

Filed: May 17, 1976.

Before: BARNES, CHOY, and GOODWIN, Circuit Judges.

The court has considered the Petition for Rehearing and Other Relief filed March 30, 1976, by Volkswagen of America and Volkswagen Products Corp., and the response filed May 4, 1976, by Calnetics Corporation and Meier-Line, Inc.

The petition for rehearing is denied; the mandate will issue forthwith.